TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~316~~ 107

LOUISA CHEW, PLAINTIFF IN ERROR,

vs.

RICHARD J. BRUMAGEN.

IN ERROR TO THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

FILED NOVEMBER 29, 1870.

SUPREME COURT OF THE UNITED STATES.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chancellor of the court of chancery of the State of New Jersey, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in a suit in which judgment was lately rendered by the court of errors and appeals, in the last resort in all causes of the State of New Jersey, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, and in which suit and judgment in said court of errors and appeals Louisa Chew was appellant, and Richard J. Brumagen was respondent therein, said court being the highest court of law or equity of the said State in which a decision could be had in the said suit between the said parties, and the record and proceedings of the judgment so rendered by said court of errors & appeals have, since the rendition thereof, been remitted by the said court of errors & appeals to the court of chancery of the said State of New Jersey, where the same now remain of record before you in said court, and wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Louisa Chew, as by her complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.]

R. M. FULLER,
Clerk of the Circuit Court of the U. S. for the Dist. of N. J.

Allowed by—

A. O. ZABRISKIE,
President of the Court of Errors & Appeals of New Jersey.

Edward H. Owen, attorney.

The record and proceedings whereof mention is within made, together with all things touching and concerning the same, I hereby certify to

the Supreme Court of the United States, annexed to this writ, as within I am commanded.

A. O. ZABRISKIE, *Chancellor.*

b The United States of America to Richard J. Brumagen, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the court of chancery, in the State of New Jersey, wherein Louisa Chew is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment or decree rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Abraham O. Zabriskie, president of the court of errors and appeals in the State of New Jersey, this fourth day of May, in the year of our Lord one thousand eight hundred and seventy.

A. O. ZABRISKIE.

On this tenth day of May, in the year of our Lord one thousand eight hundred and seventy, personally appeared James O. N. Crist before me, the subscriber, one of the masters in chancery of the State of New Jersey, and makes oath that he delivered a true copy of the within citation to Edward T. Green, solicitor of the complainant, on the tenth day of May, instant.

JAMES O'N. CRIST.

Sworn to and subscribed the 10th day of May, A. D. 1870.

S. MORCKINS, *M. C. C.*

Service acknowledged, May 10th, 1870.

EDW. T. GREEN,
Sol'r of Compl't.

c Know all men by these presents, that we, Louisa Chew, Cyrus Curtiss, and Amos G. Hull, are held and firmly bound unto Richard J. Brumagen in the full and just sum of fifteen hundred dollars, to be paid to the said Richard J. Brumagen, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this fourth day of May, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately at a court of errors and appeals in the last resort in all causes of the State of New Jersey, in a suit depending in said court, between Louisa Chew, appellant, and Richard J. Brumagen, respondent, in said court a decree or judgment was rendered against the said Louisa Chew and in favor of the said Richard J. Brumagen, and the record and proceedings of which judgment have been remitted to, and remain in, the office of the clerk of the court of chancery of said State, and the said Louisa Chew having obtained a writ of error and filed a copy thereof in the clerk's office of the said court of chancery to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard J. Brumagen, him citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Louisa Chew shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

LOUISA CHEW. [L. S.]
CYRUS CURTISS. [L. S.]
AMOS G. HULL. [L. S.]

Sealed and delivered in presence of—
J. A. BEALL.

Approved by A. O. Zabriskie, pres't of court of errors & appeals of N. J.

UNITED STATES OF AMERICA,
State of New York, City and County of New York, ss:

Cyrus Curtiss, being duly sworn, deposes and says that he resides at number 29 West 30th street, in the city & county of New York and State of New York, and that he is worth the sum of three thousand dollars over and above all debts and liabilities owing or incurred by him, and further says not.

CYRUS CURTISS.

Subscribed and sworn to before me this 4th day of May, A. D. 1870.
J. A. BEALL,
Notary Public, N. Y. Co.

UNITED STATES OF AMERICA,
State of New York, City and County of New York, ss:

Amos G. Hull, being duly sworn, deposes and says that he resides at No. 217 Clermont avenue, city of Brooklyn, in the county of Kings and State of New York, and that he is worth the sum of three thousand dollars over and above all debts and liabilities owing by him, or incurred by him, and further says not.

AMOS G. HULL.

Subscribed & sworn to before me this 4th day of May, A. D. 1870.
J. A. BEALL,
Notary Public N. Y. Co.

STATE OF NEW YORK,
City and County of New York, ss:

I, Charles E. Loew, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that J. A. Beall, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county, the 4 day of May, 1870.

[SEAL.] CHARLES E. LOEW, *Clerk.*

[U. S. 5-ct. stamp, not cancelled.]

(Indorsed:) Filed May 4, 1870. B. Gummere, cl'k.

1 In chancery of New Jersey.

To his honor, Henry W. Green, chancellor of the State of New Jersey:

Humbly complaining, showeth unto your orator, Richard J. Brumagim, of the city and State of New York, that one Robert Chew, of the city and State of New York, on or about the thirteenth day of March, in the year of our Lord one thousand eight hundred and fifty-one, became and was justly indebted unto one Peter Walker, of the county of Middlesex, in this State, in the sum of three thousand five hundred dollars, and being so indebted, the said Robert, in order to secure the payment of the said sum of money with interest, did make and execute, under his hand and seal, and deliver unto the said Peter, his certain bond or obligation bearing date the same day and year last aforesaid, in the penal sum of seven thousand dollars, with a condition thereunder written, that if the said Robert, his heirs, executors, or administrators should well and truly pay or cause to be paid unto the said Peter, his heirs, executors, administrators, or assigns, the just
2 and full sum of three thousand five hundred dollars, lawful money of the United States of America, on or before the fifteenth day of March, eighteen hundred and fifty-six, with interest thereon, at the rate of six per cent. per annum, payable semi-annually, then the said obligation should be void; otherwise to remain in full force and virtue, as in and by said bond or obligation and the condition thereof, reference being thereunto had, will more fully and at large appear.

And your orator further shows that the said Robert Chew, in order to secure the payment of the said sum of money above mentioned, together with the interest which should accrue or become due thereon, executed and delivered unto the said Peter Walker a certain indenture of mortgage bearing date the same day and year last aforesaid, made by the said Robert Chew and Louisa, his wife, of the first part, and the said Peter Walker, of the second part, in and by which said indenture of mortgage the said parties of the first part did grant, bargain, sell, alien, release, convey, and confirm unto the said party of the second
3 part, his heirs and assigns forever, all that certain farm plantation situate in the township of North Brunswick, county of Middlesex, State of New Jersey, adjoining land of Farrand Jacobs and others, beginning at a stake in the middle of the New Washington and Cranberry road, about four and one-quarter or four and one-half miles from Washington, and running thence along land of Samuel Whitehead (1) north forty-four degrees west, ten chains and eighty-seven links *of* a chestnut tree, (2) along another line of the same and of Farrand Jacobs, south sixty-four and a half degrees west, thirty-six chains and eighty-six links to a road; thence along said road and a line of Samuel M. Graves, (3) south twenty-four degrees east, twenty-five chains, more or less; thence along line of Benjamin Petty and John Dunham, (4) north forty-five and a half degrees east, thirteen chains and eighty-links to a stake; thence (5) north sixty-five and a half degrees east, six chains and sixty links to the New Washington and Cranberry road aforesaid; thence along the middle of said road (6) north forty degrees and
4 a half east, twenty-three chains and thirty-four links to the place of beginning, and containing seventy-two acres and sixty-seven hundredths of an acre, be the same more or less, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversions and reversion, remainders and remainder, rents, issues, and profits thereof; and, also,

all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the therein above-granted and described premises, with the appurtenances unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever. Provided always, and the said indenture of mortgage was therein declared to be upon the express condition, that if the said parties of the first part, their heirs, executors, or administrators should well and truly pay unto the said party of the
5 second part, his heirs, executors, administrators, or assigns, the said sum of money mentioned in the condition of the said bond or obligation and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then the said indenture of mortgage and the estate thereby granted should cease, determine, and from thenceforth be null and void.

And your orator further shows that after the execution of the said indenture of mortgage, the same was, in due form of law, acknowledged by the said Robert Chew and his said wife, on the day of the date thereof, in the city and State of New York, before Benjamin Laban, commissioner of deeds for the State of New Jersey, and was afterwards, on the twentieth day of the said month of March, duly recorded in the clerk's office of the said county of Middlesex, as by the said indenture of mortgage, and the certificates endorsed thereon, will more fully and at large appear; and to which, for greater certainty, your orator begs leave to refer, if it shall be necessary for him so to do.

6 And your orator further showeth unto your honors that the said Peter Walker, having become indebted to one Stephen G. Wood, of the county of Middlesex, in this State, in the sum of seventeen hundred dollars, and having made and given to him his note of that date, payable to him, the said Stephen G. Wood, or order, in one year from the date thereof, in order to secure the payment thereof, he, the said Peter Walker, after the making and delivery of the said note, by his deed, bearing date the day and year last aforesaid, for the consideration therein expressed of one thousand seven hundred dollars, assigned, transferred, and set over unto the said Stephen G. Wood, his heirs, and assigns, the bond and mortgage hereinabove mentioned, as collateral security for the payment of the said note, as will more fully appear in and by the said deed of assignment now in the possession of your orator, and ready to be produced when this honorable court shall direct, and to which your orator begs leave to refer, if it shall be necessary for him so to do.

7 And your orator further showeth unto your honor that the said Peter Walker, having become indebted to the said Stephen G. Wood in the further sum of two hundred dollars, agreed with him, the said Stephen, that the said bond and mortgage should stand as security for said new indebtedness, and thereupon executed and delivered to the said Stephen a certain agreement in writing, signed by him, the said Peter, bearing date the sixteenth day of February, in the year of our Lord one thousand eight hundred and fifty-two, to the tenor and effect that he, the said Peter, acknowledged the receipt from the said Stephen of the sum of two hundred dollars, and agreeing to pay the same on the eighteenth day of November then next, and that said bond and mortgage should be held as collateral security for the payment of said last-mentioned sum, in addition to the said sum of seventeen hundred dollars, hereinbefore mentioned, as will more fully appear in and by the

said agreement in writing, now in the possession of your orator, and ready to be produced, and to which, for greater certainty, your orator begs leave to refer, if it shall be necessary for him so to do.

8 And your orator further shows unto your honor that the said assignment of the said bond and mortgage, and the said written agreement from the said Peter Walker to the said Stephen G. Wood, expressly state, and in clear terms, that said mortgage and bond are transferred to the said Stephen as and for collateral security *to* the said debts, and that therein and thereby it clearly appeared that the said Stephen had no other or further interest to or right therein than to hold the same as security and in pledge for said debts.

And your orator further showeth unto your honor that on or about the tenth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, the said Stephen G. Wood, for a certain valuable consideration, by his deed bearing date the day and year last aforesaid, granted, bargained, sold, assigned, transferred, and set over the said bond and mortgage hereinbefore mentioned, to one Martin F. Braisted; and also the money due and to grow due thereon, to have and to hold the same, unto the said Martin, his heirs, executors,

9 administrators, and assigns forever, subject only to the proviso in the said indenture of mortgage mentioned, whereby the said Martin F. Braisted bacame entitled to and vested with all the right, title, and interest, both legal and equitable, of him, the said Stephen G. Wood, in and to the said mortgaged premises and the said bond and mortgage.

And your orator further shows unto your honor that the said Martin F. Braisted and Catherine Walker, administratrix of all and singular the goods and chattels, rights and credits, which were of the said Peter Walker at his decease, on or about the ninth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, by their deed bearing that date, and for a certain valuable consideration therein expressed, and acknowledged to have been paid, bargained, sold, assigned, transferred, and set over the said bond and mortgage above mentioned to your orator, and also all the moneys due and to grow due thereon, to have and to hold the same unto your orator, his heirs, executors, administrators, and assigns forever, subject only to the proviso in the said indenture of mortgage mentioned; and your

10 orator shows and expressly charges that, by virtue of the said assignment, he became entitled to and vested with all the right, title, and interest, both legal and equitable, of the said Peter Walker, before his decease, and of the said Martin F. Braisted.

And your orator further shows that on or about the day of in the year of our Lord one thousand eight hundred and the said Peter Walker departed this life, and which was prior to the making of the said deed of assignment hereinbefore last mentioned, and that *and that* after his said decease, and before the execution of the said deed last aforesaid, letters of administration of all and singular the goods and chattels, rights and credits, which were of the said Peter Walker, were duly granted by the surrogate of the county of New York to the said Catherine Walker, and who took upon herself the burthen thereof.

And your orator further shows unto your honor, that sometime in or about the month of April, in the year of our Lord one thousand eight hundred and sixty-three, the said Peter Walker departed this life,

11 having first made and executed his last will and testament, in writing, and which was made, executed, published, and declared,

in all respects, as is required by the laws of this State for the devising of real estate, wherein and whereby he devised, among other lands, the above-mentioned mortgaged premises in fee to his said wife, Louisa Chew, and who, as your orator believes, is the owner in fee of said premises.

And your orator further shows that said principal money mentioned in the said bond or obligation, and secured thereby, and by the said deed of mortgage, with large arrears of interest, still remains due and owing to your orator, no part thereof having been paid to the persons holders of said mortgage, or to your orator, so that your orator is greatly delayed and disappointed in the receipt of the said moneys, by means of which said several premises the said deed of mortgage, and the estate thereby mortgaged as aforesaid, hath become absolute in your orator and his heirs.

And your orator further shows, that the said Robert Chew, during his lifetime, and since his decease the said Louisa, his widow,
12 since the execution of your orator's said mortgage, have possessed and enjoyed, and that said widow doth still possess and enjoy the said mortgaged premises, with the appurtenances, and that they have received, and said widow still doth receive, the rents, issues, and profits thereof.

And your orator further shows and expressly charges, that the said mortgaged premises are a slender and scanty security for the payment of the said principal and interest moneys so due to your orator as aforesaid, and that he or some other persons or persons for him, have frequently and in a friendly manner applied to the said Robert Chew, during his life, and since his decease to the said Louisa, or one of them, and requested them, or one of them, to pay and discharge the said principal and interest moneys so due to your orator on the said bond or obligation and deed of mortgage hereinbefore mentioned and set forth.

And your orator well hoped that they would have complied with such reasonable requests of your orator, and would have paid to him the said principal and interest moneys so as aforesaid due to your orator on the said bond or obligation and deed of mortgage, as in equity
13 and good conscience they ought to have done.

But now so it is, may it please your honor, that the said Louisa Chew, combining and confederating together, and to and with divers other persons at present unknown to your orator, but whose names, when discovered, he prays may be inserted herein, with proper and apt words to charge them as parties defendant hereto, and contriving how to injure and aggrieve your orator in the premises, and to defraud him of the said principal and interest moneys, so as aforesaid due to your orator on the said bond or obligation and deed of mortgage hereinbefore mentioned, sometimes give out and pretend that although your orator's estate in the said mortgaged premises may have become absolute at law, yet that your orator cannot dispose of the same to any purchaser in any manner, and that the same will be subject to an equity of redemption; and at other times the said confederates pretend that the said mortgaged premises are charged or chargeable with other encumbrances prior to your orator's said mortgage, but when and to whom given, and for what consideration, they refuse to discover; whereas your
14 orator charges and insists that if any such pretended encumbrances do exist, they are fraudulent and void, and given for no good or valuable consideration, or are paid and satisfied, and kept on foot by fraud to injure and aggrieve your orator, and ought to be delivered up to be cancelled, or declared to be of no effect against your

orator who had no notice of any such pretended encumbrances. All which actings and doings of the said defendants and their confederates are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator.

In tender consideration whereof and forasmuch as your orator hath not a complete and safe remedy in the premises at and by the strict rules of the common law, nor can foreclose the equity of redemption of the said mortgaged premises, or safely sell the same for the payment and satisfaction of the said principal and interest moneys, so as aforesaid due to your orator on said bond and obligation and deed of mortgage without the aid and decree of this honorable court:

15 To the end, therefore, that the said Louisa Chew and her confederates, when discovered, may, upon their several and respective corporal oaths, true, full, and perfect answers make to all and singular the premises, as fully and particularly as if the same were here again repeated, and they and each of them thereto particularly interrogated, according to the best of their respective knowledge, information, remembrance, and belief; and that the said defendant may be decreed to pay to your orator the said principal sum so due to him on the said bond or obligation and deed of mortgage hereinbefore mentioned and set forth, and all the interest money now due and to grow due thereon, together with all your orator's costs and charges in this behalf sustained, by a short day, to be appointed by this honorable court; and in default thereof that the said defendant, and all persons claiming or to claim under her, may be foreclosed of and from all equity of redemption or claim of, in, and to the said mortgaged premises, and every part and parcel thereof, with the appurtenances, and may deliver over unto your orator all deeds, demises, and writings

16 whatever, relating to or concerning the same, or that all and singular the said mortgaged premises, with the appurtenances, may, by the order and decree of this honorable court, be sold, and out of the moneys arising from the sale thereof your orator may be paid the full amount of the said principal sum of money so due to your orator on the said bond or obligation and deed of mortgage as aforesaid, and all the interest now due and to grow due thereon, together with all your orator's costs and charges in this behalf sustained; and that your orator may have such further and other relief in the premises as to your honor may seem meet and shall be agreeable to equity and good conscience.

May it please your honor, the premises considered, to grant unto your orator a writ or writs of subpœna, issuing out of and under the seal of this honorable court, to be directed to the said Louisa Chew, therein and thereby commanding them and each of them, on a certain day, and under a certain penalty, therein to be inserted, to be and appear before your honor, in this honorable court, then and there to answer all

17 and singular the said premises, and to stand to, abide by, and perform such order and decree therein as to your honor shall seem meet and shall be agreeable to equity and good conscience.

And your orator as in duty bound will ever pray, &c.

M. BEASLEY,
Solicitor and of Counsel with Complainants.

(Indorsed:) In chancery of N. J. Between J. Brumagim, compl't, and Louisa Chew, def't. Bill to foreclose. Beasley, sol'r. Filed February 13th, 1864.

18 [L. S.] NEW JERSEY, *to wit:*

The State of New Jersey to Louisa Chew, greeting:

We command you that you personally appear before our chancellor, in our court of chancery, on the twelfth day of March next, at Trenton, to answer to a bill of complaint exhibited against you in our said court by Richard J. Brumagim, and to do further and receive what our said court shall have considered in that behalf; and this you are not to omit, under the penalty of five hundred dollars.

Witness his honor Henry W. Green, chancellor of our said State, at Trenton, the twenty-third day of February, in the year of our Lord one thousand eight hundred and sixty-four.

BARKER GUMMERE, *Clerk.*

M. BEASLEY, *Sol.*

STATE OF NEW JERSEY, *Middlesex County, ss:*

William M. Cox, being by me duly sworn according to law, on his oath saith that he is the sheriff of the said county of Middlesex, and has made diligent inquiry in his said county for the within-named
19 defendant, Louisa Chew, for the purpose of serving her with the within writ, but has not been able to find her in his said county to serve her therewith; and he is further credibly informed, and verily believes, that the said Louisa Chew cannot be found in this State to be served therewith, and that she resides in the State of New York.

WILLIAM M. COX, *Sheriff.*

Sworn & subscribed at New Brunswick, in said county & State, this 26 February, A. D. 1864, before me.

G. B. ADRAIN, *M. C.*

(Indorsed:) In chancery. Between Richard J. Brumagim, compl't, and Louisa Chew, def't. Beasley, sol'r. Ret'ble 12th March, 1864. Affidavit of N. R., 33; return, 12—45. W'm M. Cox, sh'ff.

20 In chancery, of New Jersey.

BETWEEN RICHARD J. BRUMAGIM, COMPL'NT, *and* LOUISA CHEW, DEF'ND'T. } Order substituting solicitor.

It appearing to the court that Mercer Beasley, the solicitor of the complainant in the above-stated cause, has ceased to practice as a solicitor of this court,

It is, on this twenty-ninth day of July, A. D. eighteen hundred and sixty-four, ordered that Edward T. Green be substituted as solicitor for the complainant, in the place and stead of the said Mercer Beasley, on motion, on behalf of the complainant.

HENRY W. GREEN, *C.*

(Indorsed:) In chancery, of N. J. Between Richard J. Brumagim, compl'nt, and Louisa Chew, def'nd't. Order sub. sol. E. T. Green, sol'r. Filed July 29, 1864.

21 In chancery, of New Jersey.

BETWEEN RICHARD J. BRUMAGIM, COMPL'T, *and* LOUISA CHEW, DEF'T. } On bill, &c.—Order for publication.

The complainant having filed his bill in the above cause, and process of subpœna having been issued and returned according to law:

And it being made to appear, by affidavit, that the said Louisa Chew resides out of the State of New Jersey, and that process could not be served upon her:

It is, on this twenty-ninth day of July, one thousand eight hundred and sixty-four, on motion of Edward T. Green, solicitor of the complainant, ordered that the said absent defendant do appear, plead, demur, or answer to the complainant's bill on or before the thirtieth day of September next, or that in default thereof such decree be made against her as the chancellor shall think equitable and just.

And it is further ordered that this order shall, within twenty
22 days hereafter, be served personally on the said Louisa Chew, by a delivery of a copy thereof to her, or be published, within the said twenty days, in the Fredonian, a newspaper printed at New Brunswick, in this State, and continued therein for six weeks, successively, at least once in every week.

HENRY W. GREEN, *C.*

(Indorsed:) In chancery, N. J. Between Richard J. Brumagim, compl't, and Louisa Chew, def'd't. Order for pub. E. T. Green, sol'r. Filed July 29, 1864.

23 In chancery, of New Jersey.

BETWEEN RICHARD J. BRUMAGIM, COMPL'T, *and* LOUISA CHEW, DEFENDANT. } On bill, &c.

Appearance entered for the defendant in the above cause August 31st, 1864, by—

AB'M V. SCHENCK, *Sol'r.*

(Indorsed:) In chancery, of N. J. Between Richard J. Brumagim, compl't, and Louisa Chew, def't. Appearance. Ab'm V. Schenck, sol'r. Filed Aug. 31, 1864.

24 In chancery, of New Jersey.

The answer of Louisa Chew, defendant, to the bill of complaint of Richard J. Brumagim, complainant.

This defendant, now and at all times hereafter, saving and reserving to herself all and all manner of benefit and advantage of exception that can or may be taken to the many errors, uncertainties, insufficiencies, and other imperfections in the complainant's said bill of complaint contained, for answer thereto, or unto so much thereof as this defendant is advised is material or necessary for her to make answer unto, answering says she admits that the said Robert Chew, the husband of this defendant, now deceased, did in his lifetime, and on the said thirteenth

day of March, in the year of our Lord one thousand eight hundred and fifty-one, make and execute under his hand and seal, and deliver unto the said Peter Walker the certain bond or obligation of the said Robert Chew, bearing date the same day and year last aforesaid, in the
25 penal sum of seven thousand dollars, conditioned for the payment to the said Peter Walker, his heirs, executors, administrators, or assigns, of the sum of three thousand and five hundred dollars on or before the fifteenth day of March, in the year of our Lord one thousand eight hundred and fifty-six, with interest thereon at the rate of six per centum per annum, payable semi-annually.

And this defendant further answering admits that the said Robert Chew, in order to secure the payment of the said sum of money, with interest, did, together with this defendant, Louisa, his wife, execute and deliver unto the said Peter Walker a certain indenture of mortgage bearing such date, with such condition, and upon the lands and premises as are mentioned and described in the said bill of complaint; and that the said indenture of mortgage was duly acknowledged on the day of the date thereof by the said Robert Chew, and this defendant, his wife; and that the same was duly recorded, as is stated in the said bill of complaint.

And this defendant further answering admits and says that
26 the said Peter Walker in the said bond and indenture of mortgage mentioned, afterwards, to wit, on the eighteenth day of November, in the year of our Lord one thousand eight hundred and fifty-one, for a valuable consideration to him paid by the said Stephen G. Wood, by the certain deed of assignment of the said Peter Walker, by him executed under his hand and seal, and duly delivered, did assign, transfer, and set over unto the said Stephen G. Wood, his heirs and assigns, the said bond and mortgage, and the moneys due and to grow due thereon, with the interest.

And this defendant further answering says that she has not any information or knowledge, excepting only from the complainant's said bill of complaint, and from the complaint and proceedings hereinafter mentioned, whether or not the said Peter Walker was indebted to the said Stephen G. Wood, as stated in the complainant's said bill of complaint, and prays that if the same be deemed to be material, the complainant may be required to prove the same, according to the rules and practice of this honorable court. And she also says that she has not any knowledge, excepting only from
27 the complainant's said bill of complaint, and from the complaint and proceedings hereinafter mentioned, whether or not the said bond and mortgage were assigned by the said Peter Walker to the said Stephen G. Wood as collateral security, or as collateral security for any debt or debts due from the said Walker to the said Wood; but this defendant states that she has reason to believe, and therefore charges that the said assignment was absolute, and not made as collateral security, and prays that if the same be deemed to be material, that the complainant may be required to prove the same, according to the rules and practice of this honorable court.

And this defendant further answering says that, after the said assignment of the said bond and mortgage by the said Peter Walker to the said Stephen G. Wood, to wit, on or about the twenty-fifth day of April, in the year of our Lord one thousand eight hundred and fifty-three, the said Stephen G. Wood commenced a certain action in the supreme court of the State of New York, by summons against the said

Robert Chew and Peter Walker, and thereupon the said Stephen
28 G. Wood, the plaintiff in the said suit, filed his complaint in the said supreme court against the said Robert Chew and Peter Walker, defendants therein, setting forth the execution and delivery of the said bond by the said Chew to the said Walker; that two years of interest thereon, amounting to the sum of four hundred and twenty dollars, then was due, in arrear, and unpaid; that the said Stephen G. Wood had caused demand to be made upon the said Robert Chew for payment of the said interest moneys, which he neglected and failed to pay; that application had been made to the said Peter Walker to become a joint plaintiff in the said action with the said Stephen G. Wood, and that the said Walker was made a defendant therein because his consent to being a plaintiff could not be obtained; and further setting forth the said assignment by the said Peter Walker of the said bond, and also the said indenture of mortgage to the said Stephen G. Wood, and by his said complaint the said Stephen G. Wood demanded judgment against the said Robert Chew for the sum of four hundred and twenty dollars, with interest thereon, and costs of suit.

29 And this defendant further says that, afterwards, to wit, on or about the twenty-ninth day of September, in the year of our Lord one thousand eight hundred and fifty-three, the said Robert Chew, one of the said defendants, filed his amended answer in the said supreme court to the said complaint of the said Stephen G. Wood, setting forth false and fraudulent representations made by the said Peter Walker to the said Robert Chew, as to the situation and condition of the lands mentioned in the said indenture of mortgage, which lands were sold and conveyed by the said Walker to the said Chew, and under which said representations the said lands were purchased by the said Chew, and to secure a part of the purchase money for which said lands the said bond and indenture of mortgage were executed and given by the said Chew to the said Walker; and also setting forth fraud and defect in the title to the said lands, and by the said amended answer the said Robert Chew claimed to recoup and set off the damages sustained by him by reason of the said false and fraudulent representations, and the said fraud and defect in the title to the said lands, against
30 the said sum of money, and the interest thereon, claimed in the said bond and mortgage mentioned in the said complaint, and the said Robert Chew thereon claimed that the said bond and mortgage were fraudulently obtained from him, and denied that there was any money due to the said Peter Walker, or to the said Stephen G. Wood, as assignee, for principal or interest on the same.

And this defendant further says that the said Stephen G. Wood afterwards, to wit, on or about the third day of November, in the year of our Lord one thousand eight hundred and fifty-three, filed his replication in the said supreme court, to the said amended answer of the said Robert Chew in the said action.

And this defendant further answering says, that after the filing of the said replication by the said Stephen G. Wood, and before the twentieth day of March, in the year of our Lord one thousand eight hundred and fifty-six, but at what particular date this defendant is not informed, and cannot state, the said Peter Walker departed this life.

And this defendant admits that, prior to the said last-mentioned
31 day and year, but at what particular date this defendant is not informed and cannot state, letters of administrations of all and singular the goods and chattels, rights and credits, which were of the said Peter Walker, were duly granted by the surrogate of the county of

New York, to one Cathrine Walker, and that she took upon herself the burthen thereof.

And this defendant further answering says that, on the day and year last aforesaid, the said supreme court of the State of New York, on the application of the said Stephen G. Wood, in his said action commenced therein, and on the affidavit of the said Cathrine Walker, that Peter Walker, one of the defendants in the said action, was then deceased, by rule of the said court, ordered that the said action should, and the same thereby was, continued against the said Cathrine Walker, administratrix of the goods, chattels, and effects of the said Peter Walker, deceased; and that afterwards, to wit, on or about the fifteenth day of May, in the year of our Lord one thousand eight hundred and fifty-six, the said Stephen G. Wood filed his supplemental complaint in the
32 said supreme court in the said action, against the said Robert Chew, and Cathrine Walker, administratrix of Peter Walker, deceased, setting forth, in addition to the statements contained in his said original complaint, that interest on the said bond was in arrear and unpaid, to the thirteenth day of March, in the year last aforesaid, and that on the fifteenth day of March, in the year last aforesaid, the principal sum of three thousand and five hundred dollars, mentioned in the condition of the said bond, by the terms thereof, also became due and payable; that no part of the said principal money, nor any interest thereon, had ever been paid, and that the said Robert Chew, although requested, had neglected to pay the same, and the said Stephen G. Wood thereby demanded judgment against the said Robert Chew for the sum of three thousand and five hundred dollars, with interest, from the thirteenth day of March, A. D. one thousand eight hundred and fifty-one, besides costs.

And this defendant further says that the said Robert Chew af-
33 terwards, to wit, on or about the seventh day of September, in the year of our Lord one thousand eight hundred and fifty-seven, filed his answer in the said supreme court to the said supplemental complaint of the said Stephen G. Wood, in his said action therein, wherein the said Robert Chew set up a defence to the said action, the said false and fraudulent representations made by the said Peter Walker to the said Robert Chew, as hereinbefore stated, and also fraud and defect in the title to the said lands, as hereinbefore stated, and also claimed to recoup and set off the damages sustained by the said Robert Chew, by reason of the said false and fraudulent representations, and by reason of the said fraud and defect in the title, as hereinbefore stated; and the said Robert Chew therein claimed that the said bond and mortgage were fraudulently obtained from him, and denied that there was any money due to the said Peter Walker, or to the said Stephen G. Wood, as assignee, for principal or interest on the same.

And this defendant further answering says that, afterwards, to wit, on the twelfth day of March, in the year of our Lord one thousand
34 eight hundred and fifty-nine, the issue joined between the parties in the said action came on to be tried at a circuit of the said supreme court, holden at the city-hall, in the city of New York, in the county and State of New York, before the Honorable Henry E. Davies, one of the justices of the said supreme court, and a jury of the said county, then and there duly impannelled and sworn to try the said issue, and the said jury having heard the evidence and the testimony of the witnesses, then and there sworn in behalf of the said respective parties, then and there rendered a verdict in favor of the said Stephen G. Wood, the plaintiff in the said action, and against the said Robert Chew, one

of the defendants therein, for the sum of two thousand and seventy-one dollars and twenty-five cents; and that afterwards, to wit, on the sixth day of April, in the year last aforesaid, final judgment was entered upon the said verdict, in the said supreme court, for the said last-mentioned sum of money, in favor of the said Stephen G. Wood, plaintiff, and on his motion, against the said Robert Chew, defendant, besides
35 three hundred and eleven dollars and forty-five cents of costs and disbursements, and nine dollars and thirty-six cents interest, on the verdict, making in all the sum of two thousand three hundred and ninety-two dollars and six cents, as in and by the record and proceedings of the said judgment, or a duly exemplified copy thereof, now in the possession of this defendant, and ready to be produced and proved as this honorable court may direct, reference being thereunto had will more fully and at large appear, and to which this defendant prays leave to refer for greater certainty.

And this defendant further answering expressly alleges that, on the trial of the said action, and in the verdict of the said jury, the said court and jury, under the laws of the said State of New York, in which the said action was tried, took into consideration, and finally settled and determined by the said verdict all the matters in difference between the said parties, and raised by their said pleadings in the said action, as well the total amount of principal and interest due from
36 the said Robert Chew to the said Peter Walker, and to the said Stephen G. Wood, as his assignee, on the said bond and mortgage, as also the amount to which the said Robert Chew was entitled by way of recoupment and set-off in the said action as against the said Peter Walker and the said Stephen G. Wood, as his assignee, and that the said jury rendered their said verdict for the whole amount of principal moneys and interest then due on the said bond and mortgage, over and above the sum allowed by them in their said verdict, and on the trial of the said action to the said Robert Chew as his recoupment or set-off therein.

And this defendant further says that the said Cathrine Walker, administratrix of Peter Walker, deceased, had due notice and full knowledge of the pendency of the said action.

And this defendant further answering says that the said Robert Chew afterwards, and in his lifetime, to wit, on the seventh day of April, in the year of our Lord one thousand eight hundred and fifty-nine, paid to the said Stephen G. Wood, the said plaintiff, or his attorney in the
37 said action, the full amount of the said judgment, principal, costs, and interest, and that the said judgment was thereupon, and is now satisfied of record, and that the said judgment is fully and entirely paid, satisfied, and discharged.

And this defendant further answering says, that the said bond or obligation in the complainant's said bill of complaint mentioned, is the same identical bond mentioned in the said complaint and supplemental complaint of the said Stephen G. Wood in his said action, and that the said bond was, before the time of the alleged assignment thereof to the complainant, as stated in his said bill, merged in the said judgment, and that the said judgment was fully paid, satisfied, and discharged by the said Robert Chew in his lifetime, and that the said mortgage thereupon became and was, by the terms and condition thereof, inoperative and void; and this defendant denies that either the said Robert Chew or this defendant ever was indebted to the complainant, or that
38 the said mortgage is in any way a lien in the hands of the complainant upon the lands and premises therein described, or that

the complainant is entitled to the relief for which he prays in his said bill of complaint.

And this defendant further answering admits that she is the owner in fee of the lands and premises described in the said mortgage, the same having been conveyed to her by deed bearing date July 26, 1851, duly recorded in the clerk's office of the county of Middlesex, August 15, 1851, in book 55 of deeds, page 605, and that she denies that the same were devised to her by Peter Walker, as is stated (as this defendant supposes through inad*venture*) in the said bill of complaint; and she denies that the said Peter Walker died in the year eighteen hundred and sixty-three, but alleges that he died at the time hereinbefore set forth; and she denies that the said Peter Walker left any will, but alleges that he died intestate.

And this defendant further answering says that the said Robert Chew had not in his lifetime, as this defendant believes, nor had this
39 defendant ever (before the filing the bill of complaint in this cause) any knowledge or notice of any assignment of the said bond or of the said mortgage by the said Stephen G. Wood to any person or persons whatsoever; that no such assignment has ever been recorded in the clerk's office of the county of Middlesex, where the lands described in the said mortgage are situated; that the said Robert Chew had not in his lifetime, as this defendant believes, nor had this defendant ever (before the filing of the said bill) any knowledge or notice of any assignment of the said bond, or of the said mortgage by the said Martin F. Braisted and Cathrine Walker, or either of them, to the complainant, or to any other person or persons whatsoever, and that no such assignment has ever been recorded in the said last-mentioned office, and this defendant prays that if the said alleged assignments be deemed material the same may be duly proved.

And this defendant says that if any assignment of the said bond and mortgage was in fact made to the complainant, that the same
40 was, as this defendant has reason to suppose, believes, and charges, made long after the time mentioned in the said bill of complaint.

And this defendant further answering says that the said Robert Chew, the husband of this defendant, departed this life on the fourth day of February, in the year of our Lord one thousand eight hundred and sixty-three, having first duly made and published his last will and testament in writing, in and by which he appointed this defendant his sole executrix, and which said will was, on the 7 day of May, 1863, duly proved by this defendant before Gideon J. Tucker, esqr., surrogate of the county of New York, and letters testamentary were by him duly issued thereon to this defendant.

And this defendant further answering says that she supposed and believed, after the said judgment had been paid, that the said mortgage had been entirely cancelled until about the month of May, in the year of our Lord one thousand eight hundred and sixty-three, when this defendant, desiring to raise some money by mortgage on the said
41 lands, it was objected that the said mortgage had not been cancelled of record; that this defendant thereupon called upon the Stephen G. Wood in order to obtain the said mortgage to have the same cancelled of record; that the said Wood put this defendant off with various pretexts from time to time, and finally informed this defendant that when the said judgement and mortgage had been paid he had delivered the said mortgage to the said Cathrine Walker; that this

defendant had retained counsel, and was about to file a bill in this honorable court to compel the delivery and cancellation of the said bond and mortgage, when she was informed that the complainant's said bill had been filed, and she states that she has reason to believe, and does believe, and charges that the said Stephen G. Wood and Cathrine Walker have acted collusively and fraudulently in the matter of the alleged assignment of the said mortgage, and for the purpose of defrauding this defendant; and she respectfully submits and insists that the said bond and mortgage ought to be delivered up to this defend-
42 ant to be cancelled.

And this defendant denies all and all manner of unlawful combination and confederacy without that; that there is any other matter, cause, or thing in the complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, avoided, traversed, or denied, is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable shall direct, and prays to be hence dismissed, with her reasonable costs and charges in this behalf most wrongfully sustained.

AB'M V. SCHENCK,
Sol'r for & of Counsel with Defendant.

NEW JERSEY, *Middlesex County, ss:*

Louisa Chew, the said defendant, being duly sworn according to law, on her oath says that the matters and things set forth and con-
43 tained in the foregoing answer, so far as they relate to the acts and deeds of this deponent are true, and so far as they relate to the acts and deeds of others, this deponent believes them to be true.

LOUISA CHEW.

Sworn and subscribed at New Brunswick, in said county & State, September 16th, 1864, before me.

G. B. ADRAIN,
Master in Chancery.

(Indorsed:) In chancery of N. J. Between Richard J. Brumagim, compl't, and Louisa Chew, def't. Answer. Ab'm V. Schenck, sol. Filed Sept. 17, 1864.

44 In chancery, N. J.

BETWEEN RICHARD J. BRUMAGIM, COMPL'T, *and* LOUISA CHEW, DEF'T. } On bill, &c.—Replication.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without that, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is untrue; all which matters and things this repliant is

and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

EDW. T. GREEN,
Sol'r & of Counsel with Compl't.

(Indorsed:) In chancery, N. J. Brumagim, compl't, and Chew, def't. Replication. E. T. Green, sol'r. Filed Feb'y 9, 1865.

45 In chancery, of New Jersey.

BETWEEN RICHARD J. BRUMAGIN, COMPLAINANT,
and
LOUISA CHEW, DEF'T. } On bill, &c.

Proofs taken in the above-stated cause, before the subscriber, one of the masters and examiners of the court of chancery of the State of New Jersey, at his office, in the city of Trenton, on Tuesday, the 14th day of May, 1867, in the presence of Edward T. Green, esq., solicitor of the complainant, and of A. V. Schenck, esq., solicitor of the defendant, pursuant to notice given, service of which was duly acknowledged by the said solicitor of the defendant.

JAMES S. AITKIN, *M. C. C.*

The solicitor of the complainant offered in evidence, on the part of the said complainant, the following:

1. A certain indenture of mortgage, bearing date the 13th day of March, 1851, executed by Robert Chew and Louisa Chew to Peter Walker, and which is marked Exhibit "A," ex-parte complainant.

46 2. A power of attorney accompanying the said mortgage, from Robert Chew to Louisa Chew, dated the 19th day of August, 1848, and which is marked Exhibit B, ex-parte compl't.

3. A bond given by Robert Chew to Peter Walker, secured by the mortgage aforesaid, of the same date, and which is marked Exhibit C, ex-parte complainant.

4. An assignment of the said mortgage from Peter Walker to Stephen G. Wood, dated November 18th, 1851, and which is marked Exhibit "D," ex-parte complainant.

5. An assignment of the same, from Stephen G. Wood to Martin F. Braister, dated December 10th, 1857, and which is marked Exhibit E, ex-parte complainant.

6. An assignment of the same from Catharine Walker, administratrix of Peter Walker, dec'd, and Martin F. Braisted, to Richard J. Brumagin, dated April 9th, 1859, and which is marked Exhibit F, ex-parte compl't.

All of which is excepted to by Mr. Schenck on the part of the defendant.

The solicitor of the complainant here stated that he rested the case on the part of the complainant.

(Indorsed:) In chancery, N. J. Between Richard J. Brumagin, complainant, and Louisa Chew, def't. Proofs. E. T. Green, sol'r. Filed May 18, 1867. Master's fees: To taking proofs, 6 fol., 1 20; marking exhibits, 6, 60—$1 80.

47 In chancery, of New Jersey.

BETWEEN RICHARD J. BRUMAGIM, COMPL'T, *and* LOUISA CHEW, DEF'T. } Rule of hearing, entered May 20th, 1867.

It is ordered, on motion of E. T. Green, solicitor of the complainant, that this cause be set down for hearing on the first day of the present stated May term of this court, to be held at the State-house, in the city of Trenton, at the hour of ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard thereon.

By the court:

B. GUMMERE, *Clk.*

48 In chancery, of New Jersey.

BETWEEN RICHARD J. BRUMAGIN, COMPLAINANT, *and* LOUISA CHEW, DEFENDANT. } On bill, &c.

Examination & depositions of witnesses in the above cause, taken on the part of the defendant, before me, George C. Ludlow, a master & examiner of said court of chancery, N. J., at my office in New Brunswick, May 25th, A. D. 1867; in the presence of Ab'm V. Schenck, esq., sol. of defendant, & Edward T. Green, esqr., solicitor of complainant, upon due notice of the taking of the same, admitted before me by the parties attending.

GEORGE C. LUDLOW,
Master in Chan., N. J.

MAY 25, 1867.—The solicitor for defendant produced & offered the following exhibits on part of the defendant, viz:

Ex. A for def'd't.

The defendant offers exemplified copy of judgment recovered in the supreme court of the city & county of New York, in cause in which Stephen G. Wood is plaintiff, and Robert Chew and Peter Walker are defendants; date of ju'g't, April 6, 1859, for $2,091 25 for principal & interest, and $311 45, costs & disbursements, and $9 36 interest on verdict, amounting all to $2,392 00. Exhibit ex-parte defendant A, excepted to by sol'r for compl't.

49

LUDLOW, *Ex.*

Exhibit B for def'd't.

Also a certificate annexed to said exemplification, bearing date the 22d day of September, 1859, signed by John Claney, clerk, under seal of county clerk of the city & county of New York, certifying that the said judgment is satisfied of record, offered & marked Exhibit B, for defendant. Excepted to by sol. for compl't.

LUDLOW, *Ex.*

NEW JERSEY, *ss:*

PHILIP MILSPAUGH, a witness produced & examined on the part of

the defendant, being duly sworn to testify the truth, the whole truth, & nothing but the truth in said cause, on his oath deposeth & says:

I reside in the city of New York; I am an attorney and counsellor at law; I am practising alone in business; I was with William S. Sears, of New York city, an attorney and counsellor at law of New York; I was not connected with him in business as a partner, but done business in his office; this I did until about four years past.

50 Ques. State whether or not William S. Sears was the attorney for Robert Chew, in an action pending in the supreme court of the city & county of New York, brought by Stephen G. Wood, against said Chew & one Peter Walker.

Ans. He was.

(Witness shown a certified copy of the bill of complaint in this cause.)

Ques. State whether or not the suit to which you have referred, brought by Stephen G. Wood against Robert Chew & Peter Walker, in the supreme court of the city & county of New York, was brought to recover the amount due on the identical bond set forth in the bill of complaint in this cause.

(Ques. objected to as leading & otherwise bad.—LUDLOW, *Ex.*)

Ans. I believe it is the same.

Ques. State whether or not the amount of the judgment, $2,392 06, recovered by Stephen G. Wood against Robert Chew, in the action to which you have referred, was paid; and if so, state by whom, to whom, & where the same was paid.

Ans. It was paid by Robert Chew to Benjamin T. Kissam, the attorney & counsel for Stephen G. Wood, in his (Kissam's) office, in the city of New York, on the eleventh day of April, A. D. eighteen hundred and fifty-nine.

51 Ques. State whether or not you were present at the time of the said payment; and if so, what was done by you thereupon.

Ans. I was present at the time; I went with Mr. Chew, and upon the *the* payment, I asked Mr. Kissam for a satisfaction piece of the judgment, which he gave me, and which I filed the same day in the county clerk's office of the city and county of New York.

Ques. Who was county clerk of the city & county of New York at that time?

Ans. John Clancey, I believe, was at that time county clerk.

Ques. Are you acquainted with his handwriting?

Ans. I can't say that I am acquainted with his handwriting, but will state the circumstances connected with the manner of doing business in his office. Certificates of this nature, certificates of satisfaction, & of copies of papers from that office, are in every instance signed by the chief clerk, in the name of said Clancey, he uses his name altogether. They are examined by the chief clerk, & found to be correct, and he always signs them in his name; have seen him do this when Clan-

52 cey was present.

(The witness being shown Exhibit B, for def'd't:

Ques. State whether the paper shown you is sealed with the seals of the city & county of New York, and is signed by John Clancey, clerk of the city & county of New York, or by his chief clerk, in the manne in which you have designated?

(Ques. objected to.)

Ans. I believe it is a paper signed by the clerk, under the seal of the court, at the time it bears date.

Ques. Is Robert Chew now living or dead?

Ans. He is dead.

Ques. At the time the judgment was paid to Benjamin T. Kissam, attorney for Stephen G. Wood, state whether or not you made any demand of Mr. Kissam, as such attorney; and if so, state the nature of that demand, & his reply?

(Comp't objects to so much of answer as would be based upon any reply of Mr. Kissam.—LUDLOW, *Ex.*)

Ans. At the same time that I got the satisfaction piece from Mr. Kissam, I demanded of him, or asked of him, the bond & mortgage,
53 the bond upon which this judgment was entered, together with the mortgage, which he refused to deliver to me, saying that, in the first place, he had no control of it, or that he had'nt it, one of the two; afterwards he intimated or stated that he did'nt know but that some other person had an interest in it; he did'nt mention the name of that person; and that he was not authorised to deliver them without the consent of that person; he did'nt give me the name of that person; I then stated to him that as I thought the bond and mortgage had been paid, we were entitled to them; I mean by "we" Mr. Chew; I was acting for him; Mr. Chew was present during the whole of this conversation.

Ques. Did Mr. Kissam at first deny that he had possession of that bond and mortgage in that conversation?

(Ques. objected to as leading & incompetent.—LUDLOW, *Ex.*)

Ans. He hesitated before he gave me any answer, but did say that he had'nt it; but afterwards, in the course of the conversation, told me that he had no control of it.

54 Ques. Did Mr. Kissam afterwards make any admission in reference to the possession by him of the bond & mortgage? and if so, state what.

(Ques. objected to as impertinent to the issue, & otherwise incompetent.)

Ans. I cannot say that he made any direct admission, but I inferred from our conversation that he had it, and I made that charge to him, which he neither admitted or denied.

(This answer from "I inferred" excepted to.)

PHILIP MILSPAUGH.

Sworn to and subscribed the 25th day of May, A. D. 1867, at New Brunswick, in said State, before me.

GEORGE C. LUDLOW,
Master in Chancery of New Jersey.

The foregoing are all the depositions taken, & exhibits produced before me by the defendant.

May 25, 1867.

GEORGE C. LUDLOW,
Mast. & Ex.

55 In chancery, N. J.

RICHARD J. BRUMAGIN, COMPL'T,
and
LOUISA CHEW, DEF'D'T.

The following depositions were taken before me in the above cause, on the 25th day of May, A. D. 1867, in the presence of Edward T. Green, esqr., sol'r of complainant, & Ab'm V. Schenck, esqr., sol. of defendant, by consent of parties; and witness examined on the part of complainant.

GEORGE C. LUDLOW,
Master in Ch., N. J.

NEW JERSEY, *ss:*

STEPHEN G. WOOD, a witness produced & examined on the part of the complainant, being first duly sworn according to law to testify the truth, the whole truth, & nothing but the truth in said cause, on his oath deposeth & says:

Being shown a promissory note dated Rahway, November 18, 1851, signed Peter Walker, for seventeen hundred dollars, with interest till paid, marked Exhibit No. 1, of May 25, 1867, for complainant, says: (Ex. No. 1, of May 25, '67, for compl't.)

Ques. Whose signature is attached to this paper?

56 Ans. Peter Walker; I saw him write his name to it.

Ques. Is this the note for which the bond and mortgage, Exhibit G, 1 & 2, were given by Peter Walker to you as collateral security?

Ans. Yes, sir.

Ques. Was this note referred to in the assignment of that bond & mortgage as such collateral?

Ans. Yes.

S. G. WOOD.

Sworn to and subscribed the 25th day of May, A. D. 1867, at New Brunswick, in said State, before me.

GEORGE C. LUDLOW,
Master in Ch., N. J.

(Indorsed:) In chancery, N. J. Bet. Richard J. Brumagin, compl't, and Louisa Chew, def'd't. Depositions on part of def'd't & compl't, May 25, '67. Filed June 3, 1867. Master's fees: Swear'g 1 wit's, 20; dep's, 15 fol., 3 00; mar'g 2 ex., 20—d'f'd't's sol'r dr., $3 40. Compl't dr Swear'g 1 wit's, 20; dep's 3 fol., 60; mar'g 1 ex., 10—compl't's so'l dr.,: 90.

57 In chancery of New Jersey.

BETWEEN RICHARD J. BRUMAGIM, COMPL'N'T, *and* LOUISA CHEW, DEF'D'T. } Rule of hearing, entered October 4th, 1867.

It is ordered, on motion of E. T. Green, solicitor of the complainant, that this cause be set down for hearing on the first day of the present stated October term of this court, to be held at the State-house, in the city of Trenton, at the hour of ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard thereon.

By the court:

B. GUMMERE, *Cl'k.*

58 In chancery, New Jersey.

RICHARD J. BRUMMAGEN, COMPLAINANT, *vs.* LOUISA CHEW, DEFENDANT.

To the Honorable Abraham O. Zabriskie, chancellor of the State of New Jersey:

Your petitioner, Louisa Chew, the defendant above named, respectfully shows that she is a resident of the city of New York, and is the widow of the late Robert Chew, who is mentioned in the pleadings herein, as the mortgagor in the mortgage also mentioned in said pleadings,

and that after & upon the death of the said Robert, your petitioner, under the last will and testament of the said Robert, became the owner of the lands & premises covered by said mortgage.

Your petitioner is advised and informed and believes that this cause has been heretofore brought to a hearing before your honor upon the pleadings and proofs therein, and that upon such hearing, and some time in the month of February last past, an opinion was given by this
59 honorable court, in writing, in and by which it is held that the complainant is entitled to a decree for the foreclosure of the said mortgage and sale of the mortgaged premises, and that in such opinion the aforesaid conclusion is based upon the ground that in the suit which is set forth in the defendant's answer herein brought in the supreme court of New York upon the bond, to secure the payment of which said mortgage was given, neither Peter Walker, the obligee in said bond named, during his lifetime, nor his administratrix after his death, was made a party plaintiff or defendant in said action, in fact, & that, therefore, and for that reason, the judgment in such action upon such bond did not affect the rights of the said Walker or his estate under such bond, or operate as a defence to the judgment of foreclosure prayed for by the complainant in this action.

Your petitioner is further informed and advised and believes that upon the taking of the proofs in this suit, no testimony was put in, showing or intending to show whether, by the established rules
60 of law in the State of New York, the said Peter Walker, during his lifetime, or his administratrix, after his death, was a necessary party to the suit aforesaid, upon such bond, in order to have the said judgment in such action upon such bond operate as a bar to any further action upon the same by the said Walker or his administratrix, or at the suit of any other person claiming under the said Walker or his administratrix, by virtue of such bond or mortgage.

And your petitioner further shows that she is advised and believes that neither said Peter Walker nor his said administratrix was, by the laws of the State of New York a necessary party to such suit upon said bond, but that the aforesaid judgment in such suit upon said bond, did, by the law of the State of New York, operate effectually to bar the said administratrix, as such, and the said complainant herein, from any and all right to maintain this action to foreclose the mortgage aforesaid; and that the said bond, and all right, title, and interest in the same, whether of the said Peter Walker, or his administratrix,
61 and of the complainant herein, was merged in the said judgment so recovered in such suit in the supreme court of New York, in fact and by the law of New York, and that the opposite of such conclusion so arrived at by this court, in the opinion of your honor aforesaid, is based upon a misapprehension of the law in that particular as held in the courts of the State of New York aforesaid.

Your petitioner begs leave here to refer to the said opinion of this honorable court for greater certainty, and also to the pleadings and proofs herein. She further begs leave to refer to the papers to this her petition annexed, containing the opinions of gentlemen learned in the law, and counsellors at law in the courts of the State of New York.

Your petitioner further shows that, since the argument and hearing upon the pleadings and proofs aforesaid herein before this honorable court, no order or decree has been made herein; that no order has been made to compute the amount due upon said mortgage under
62 said opinion, and that no interlocutory or final decree has been made herein, or order signed or entered therefor.

Your petitioner further shows that she will be able to prove a perfect defence as to all of the said money secured by said bond, over and above that which has been paid by the payment of said judgment, and her defence thereto will appear in the facts set forth by your petitioner's husband in his answer to the complaint filed in said action in the State of New York, a copy of which is hereto annexed in a schedule marked A.

And your petitioner states that she & her counsel relied upon the said judgment as conclusive proof that nothing was due upon said bond, and were surprised by the construction that has been given to the New York code in respect to the parties necessary to actions, and the binding effect of judgments in such cases as the one in question. That your petitioner is able to prove said defence in said Schedule A set forth, and, unless said judgment is a bar, she humbly submits that she ought to be permitted to set up such facts to establish the same otherwise
63 than by said judgment; that such defence will be making no new issue in the case, and the letting in of such proof will be merely substituting one proof for another, which, if a foreign law, was as she supposed it, & her counsel supposed it to be, would have been in this jurisdiction as effectual proof of the real issue between the parties as the proof by witnesses, which she is still able to make.

Your petitioner, therefore, prays that an order may be made herein reopening the proofs, in order that proof may be put in showing what is the law of the State of New York in the regard hereinbefore mentioned, and whether or not the said Peter Walker, or his administratrix, was a necessary party to such suit in the State of New York, in order to bar the right of the said Peter Walker, or his administratrix, or the said complainant herein, from any further action upon said bond, or the mortgage aforesaid, given to secure such bond.

And she further prays that she may be permitted to put in further proof to show and establish, either by an amendment of the New
64 York record, or by parol, that in point of fact the attorney of record for the plaintiff in the suit upon said bond in the supreme court of the State of New York aforesaid, did in fact appear in such action last aforesaid both for the said Peter Walker, in his lifetime, & for the administratrix of his estate, after the death of the said Peter Walker, although such appearance is not, by reason of a misapprehenson of the clerk in making up the record, regularly made to appear of record in the judgment-roll of the judgment therein. And if it be necessary to entitle your petitioner to the benefit of the defence made in the action on the said bond in the State of New York, if the said record is not conclusive, or to entitle her to the benefit of the law of New York, (which she is advised has been misapprehended,) or to any of the relief hereinbefore asked, your petitioner prays for leave to file a supplemental bill in the nature of a bill of review, and that the rehearing of the original cause, and the hearing of the matters in said supplemental bill, and the pleadings thereafter, & the proofs to be made thereunder, may
65 come on together, and that your petitioner may have such other and further or other or further relief as to this honorable court shall seem meet and shall be agreeable to equity.

AB'M V. SCHENCK,
Sol'r for & of Counsel with Petitioner.

We conceive that this cause is proper to be reheard, and that the matters set forth in the above petition are sufficient to entitle the petitioner to the rehearing, and the other relief prayed.

AB'M V. SCHENCK, *of Counsel.*
JNO. LINN, *of Counsel.*

STATE OF NEW YORK,
City & County of New York, ss:

Louisa Chew, being duly sworn according to law, on her oath, deposeth and saith that the matters set forth in the foregoing petition are true so far as they relate to her own acts and deeds, and as to all other matters she believes it to be true; and further, that deponent resides in the said city, county, & State of New York.

LOUISA CHEW.

66 Sworn to and subscribed before me this 29th June, 1868. Witness my hand and official seal.

[L. S.] HENRY C. BANKS,
Comm'r for New Jersey, 3 John St., N. Y.

In chancery, New Jersey.

RICHARD J. BRUMMAGEN
vs.
LOUISA CHEW.

CITY & COUNTY OF NEW YORK, *ss:*

Edward P. Cowles, being duly sworn, says as follows:

I am & have been for many years a counsellor-at-law, and as such am now practising in the courts of the State of New York, in the city of New York.

I have read the certificate of Hon. Henry E. Davies, accompanying & annexed to the petition of the def't herein. I was engaged and assisted in the trial of the suit of Stephen G. Wood against Robert Chew, on the 12th March, 1859, as counsel for said Chew, & being the same suit mentioned in such certificate. The questions tried at that time, in that suit, are correctly stated in the aforesaid certifi-
67 cate of Judge Davies. I believe I am fully informed as to the effect of that judgment upon the personal representatives of Peter Walker, and upon any and all persons claiming under the bond on which that suit was brought, by title derived from Peter Walker in his lifetime, or from his personal representatives after his death, by, assignment from Peter Walker of his estate after the commencement of that suit. As I understand the law of New York, and believe it to be, no one except the plaintiff therein, to wit, the assignee of the bond, Stephen G. Wood, and the obligor, in said bond, named Robert Chew, was a necessary party to that suit, in order to render the judgment recovered in that action, as shown in the exemplification thereof and which exemplification is hereto annexed, a complete and perfect determination of the question as to the amount actually due and payable by Robert Chew upon and under such bond; as such judgment, as so shown in such exemplification, and being the same judgment mentioned in the aforesaid certificate of Hon. H. E. Davies aforesaid, was, as I
68 understand the law of New York to be, a complete and final judgment in that suit as to that question, in form, in legal effect, in substance, and in fact, binding not only upon the plaintiff and defendant therein, but also upon the administratrix, or other personal representatives of the said Peter Walker, and upon any and all other persons or parties claiming under said Peter Walker, or his administratrix, or other personal representatives, by title acquired subsequent to the commencement of that suit, in all the courts of the State of New York,

until the said judgment should be set aside or reversed; and in said courts, until reversed or set aside, operates as a perfect and complete bar to any suit by any party or parties last above named, under or upon said bond.

E. P. COWLES.

Sworn before me this 29 day of June, 1868.

W. Q. RIDDLE,
Notary Public, N. Y. City.

69 I, Henry E. Davies, of the city of New York, late a justice of the supreme court of the State of New York, do certify that at a circuit court held in and for the city and county of New York, held on the 12th day of March, 1859, before me, there came on to be tried the action in favor of Stephen G. Wood, as assignee of a bond made by Robert Chew to one Peter Walker, and by him assigned to said Wood, dated March 13, 1851, to secure the payment of the sum of $3,500, and the interest thereon from September 13, 1851; that the plaintiff in said action claimed to receive the whole amount of said principal sum and the interest thereon from the day last mentioned; that upon said trial the defendant, Chew, claimed and insisted that false representations had been made to him as to the condition and productions of the farm sold by said Walker to him, and for the consideration or purchase money whereof said bond was given. And said Chew claimed and insisted that he was entitled to have deducted from the amount due on said bond the difference between the value of said farm as it
70 was, and the price he agreed to pay for the same, on the belief that the representations of said Walker, as to its state, condition, and capacity were true; that the plaintiff insisted that as matters of law the defendant, Chew, was not entitled to set up as against him any such claim. But I held and decided that the plaintiff took the assignment of said bond subject to all the equities thereon existing in favor of the obligor, and that the same defences thereto could be set up as if the suit has been in the name of Walker, the original obligee; and such I understand to be the law of the State of New York; that said cause was tried with vigor and earnestness on both sides, and that upon hearing all the testimony adduced on both sides, the jury rendered a verdict for the plaintiff on said 12th day of March, 1859, for the sum of $2,071 25; that sum being, in the opinion of the jury, upon the principles of law as stated by the court, after making the deductions aforesaid, the whole amount of principal and interest due on that day upon said bond, and judgment was rendered for the plaint-
71 iff accordingly; that by the laws of the State of New York, it was not necessary to a full determination and ascertainment of the amount due upon said bond that any other persons than the assignee and obligor should be parties to that action, and that according to the laws of this State, in all courts therein, the judgment in that action settling and determining the amount due upon said bond on said 12th day of March, 1859, is res adjudicata and final and conclusive in all courts, until reversed and set aside.

Dated New York, June 26, 1868.

HENRY E. DAVIES.

I have read the foregoing opinion of Judge Davies and concur with him in stating that, upon the facts therein set forth, the law of the State of New York is, that the judgment in such opinion mentioned is a bar

as against the assignor of the bond, and all claiming through or under him after suit brought.

New York, June, 1868.

E. M. STOUGHTON.

(Indorsed:) In chancery, N. J. Between Richard J. Brummgem, compl'nt, and Louisa Chew, def'nd't. Petition. A. V. Schenck, sol. Filed July 1, 1868.

72 In chancery, New Jersey, before the chancellor.

RICHARD J. BRUMMAGEN
vs.
LOUISA CHEW.

Upon reading the petition of the defendant, Louisa Chew, and the papers thereto annexed, and on motion of Abraham V. Schenck, of counsel for the said defendant,

It is hereby ordered that the complainant above named do show cause, before me, at my chambers in Jersey City, on the 13th day of July, 1868, at 10 o'c' of that day, why the prayer of the petitioner should not be granted in whole or in part; and let a copy of such petition and accompanying papers, except the exemplified copy of the judgment-rule thereto annexed, be served on the complainant's solicitor herein on or before the 3d day of July inst.; and in the meantime, and until such motion is heard and decided, let all further proceedings on the part of the complainant in this suit be stayed.

July 1, 1868.

A. O. ZABRISKIE, *C.*

(Indorsed:) In chancery of N. J. Between Richard J. Brummgen, compl't, and Louisa Chew, def't. On petition. Order to show cause. Ab'm V. Schenck, sol. Filed July 1, 1868.

73 In chancery of New Jersey.

RICHARD J. BRUMMAGEM, COMPL'T,
and
LOUISA CHEW, DEF'T.
On petition for rehearing, &c.

STATE OF NEW JERSEY, *ss:*

Edward T. Green, of the city of Trenton, in the State of New Jersey, being duly sworn according to law, on his oath deposeth and saith that he is the solicitor upon record of Richard J. Brummagim, the above-named complainant, and as such has conducted the said cause in the court of chancery; that, after his honor the chancellor had delivered his opinion in said cause at the February term of the said court now last past, this deponent had an interview with A. V. Schenck, esqr., solicitor of the said defendant, and who had had the sole charge of her said case, as to the course the said defendant proposed to pursue in the matter; that said Schenck informed this deponent that she, the said defendant, intended to proceed no further with the cause by way
74 of appeal or otherwise, but had determined to pay and satisfy the mortgage-debt adjudged to be due to the complainant; that said defendant was about to take, or had already taken, measures to raise funds to meet said claim, and that the whole matter would be

speedily closed up and settled; and that he desired this deponent to add no more costs to those already incurred by, and adjudged against, the said defendants by preparing or filing any decree or order in the cause; that this deponent then and there agreed, for the sole purpose of accommodating said defendant, to refrain from filing any decree or order, so that the costs to be taxed against said defendant might not be increased; that, shortly afterwards, one John G. Shultz, representing himself to be the business agent of the defendant, called at the office of this deponent, and informed him that he desired to obtain for the defendant the full amount due upon the mortgage-debt in controversy, as said defendant was anxious to pay and satisfy the same; that, at said time, this deponent was unable to give him said amount, the
75 said mortgage papers being in the custody of Benjamin Williamson, esqr., in the city of Jersey City; but this deponent promised to send the amount to the said Shultz as soon as obtained; that some delay occurred before this deponent obtained the said papers from Jersey City, and in the meantime the deponent received a letter from the said Shultz, reiterating his request for the amount of the debt, stating in effect that the defendant was anxious to settle, and requesting that no more costs be added to those already incurred; that, shortly afterwards, this deponent sent to the said Shultz a statement of the amount due upon the said bond and mortgage; that this deponent from that time until the June term of the supreme court of this State heard nothing from said defendant or any one representing her; but during the said June term of said court this deponent saw and conversed with Mr. Schenck in reference to the matter, and was again assured by him that the defendant was making her preparations to pay the claim of the complainant; that in the latter part of said month this deponent,
76 being dissatisfied with the delay, sent to the said Schenck a notice in writing that the claim must be paid on or before the first day of July then next ensuing; that he met the said Schenck in Trenton on the day the said notice was mailed, and informed him of its contents; that Mr. Schenck then said that he did not know what arrangements were being made in the matter; that this deponent expressed his dissatisfaction with the delay, and informed Mr. Schenck he intended immediately to file a decree in the cause; that Mr. Schenck again solicited this deponent to take no such step until after the said first day of July; and to this, after some hesitation, this deponent agreed; that on said first day of July, in the afternoon, a copy of the petition for a rehearing was served upon this deponent by a person to this deponent unknown.

And this deponent saith that the course taken by the said defendant and her legal advisers is a great surprise to him; and that, had
77 he not placed implicit confidence in the statements made to him by those who represented said defendant, he would have filed a decree, and issued thereon an execution against said defendant months ago.

EDW. T. GREEN.

Swore & subscribed this 9th day of July, A. D. 1868, before me.
JAMES S. AITKIN,
Master in Chancery.

(Indorsed:) In chancery, N. J. Between Richard J. Brumagin, compl'n't, and Louisa Chew, def'nd't. Aff'd't E. T. Green, sol'r. Filed July 9, 1868.

78 In chancery, New Jersey, before the chancellor.

RICHARD J. BRUMMAGEM
vs.
LOUISA CHEW.

STATE OF NEW JERSEY, *Hudson Co., ss:*

Benjamin T. Kissam, of the city of New York, being duly sworn, deposes and says that he was the attorney for Stephen G. Wood, plaintiff, in an action in the supreme court of the State of New York, against Robert Chew and Peter Walker, defendants, upon a bond, dated March 13th, 1851, made by said Chew to said Walker, to secure the payment of $3,500 00 and interest; that said action was commenced on the 28th day of Ap'l, 1853, by the service of a summons and copy of complaint on the defendant Chew.

The defendant Walker never was served with a summons, because at about the time of commencing the action he moved out of the State of New York, and he never became a party to the action.

The complaint in the action, after setting forth the making,
79 &c., of the bond, stated in substance that the defendant Walker owed the plaintiff Wood $1,700 00, for which said Wood held the promissory note of said Walker, and that on said 18th day of November, the said Walker, by a written assignment, transferred to the said Wood the bond aforesaid, and also a mortgage, bearing even date with said bond, as collateral security for the payment of said note, and also for the further sum of two hundred dollars, subsequently advanced by said Wood to said Walker, on the faith of said securities.

The said complaint further stated that application had been made to said Walker to become a joint plaintiff in said action, and that he was made a defendant therein because his consent to being a plaintiff could not be obtained.

Deponent further says, that the law of the State of New York, at the time of the commencement of said action, as contained in the "Code of Procedure," which was then and is now the law in regard to the practice in the courts of said State, required every action to be prosecuted in the name of the real party in interest, excepting that an
80 executor, or administrator, a trustee of an express trust, or person expressly authorized by statute, might sue without joining with him the person for whose benefit the action was prosecuted; said code also required that all persons having an interest in the subject of the action, and in obtaining the relief demanded, must be joined as plaintiffs, excepting, if the consent of any one who should have been joined as plaintiff could not be obtained, he might be made a defendant, the reason thereof being stated in the complaint.

Deponent further says that the said Walker had such an interest in the subject of said action, as to require his being made a plaintiff therein, if he would consent thereto, but otherwise his being made a defendant.

Deponent further saith that, having done all that was required by the law to place the action on part of the plaintiff properly before the court, it remained for the attorney of the defendant Chew, to see that his co-defendant in the action was properly brought into
81 court before going to trial, and to insist upon and have his appearance entered, which he failed to do.

After the death of Peter Walker it was stipulated between the at-

torney for the defendant Chew, and this deponent, that the said action should be continued in the name of Catherine Walker, administratrix of the goods, &c., of Peter Walker, deceased, and an order of the court was accordingly made, and entered to that effect. But no copy of that said order was ever served on the said Catherine Walker, and no proceedings were taken to bring her before the court, and she never was made a party to the action.

On the 9th March, 1859, the issues joined by the pleadings aforesaid of the plaintiff and defendant Chew, came on for trial before Henry E. Davies, then one of the justices of the supreme court of the State of New York.

Deponent appeared for the plaintiff, Stephen G. Wood, only, as his attorney and counsel, and tried the case on his behalf, and on the
12th day of March aforesaid, the jury rendered a verdict for the
82 plaintiff, as appears by said judgment-roll.

On the 15th March aforesaid the costs were adjusted by the clerk of the court, pursuant to notice, and on the 6th April, 1859, the said judgment-roll was made up, and filed with the said clerk, and judgment entered.

And that said judgment-roll contains all the papers required by the 281 section of the Code of Procedure of the State of New York to be attached together and filed, excepting a "Report, offer of defendant, exceptions and case." There was no reference, and consequently no report was made. The defendants never made any offer, and no appeal being taken, there were no exceptions nor case to be attached.

Deponent further saith that, on the 7th day of April, 1859, a notice of the entry of said judgment was served on the attorney for the defendant Chew, and that the deponent, up to the time of his attention being called to the petition of Louisa Chew, had never received any intimation, by word or notice, that there was any omission or
83 irregularity in the judgment-roll aforesaid.

Deponent further says there was no misapprehension on the part of the clerk in making up the record or the judgment-roll in said action.

Deponent further says, that the judgment, rendered as aforesaid in favor of Stephen G. Wood, according to the law of the State of New York, has no effect upon the interest which said Walker, or his administratrix, had in said bond and mortgage, and according to the law aforesaid, is no bar against them, and is not res adjudicata, or final, or conclusion, so far as Walker and his representatives are concerned.

BENJ. T. KISSAM.

Sworn before me this 8th day of July, 1868.

ISAAC ROMAINE,
Master in Ch'c'y, N. J.

We hereby certify that we have read the annexed affidavit of Benjamin T. Kissam, in respect to a certain action in the supreme court of the State of New York, wherein Stephen G. Wood was plaintiff, and
Robert Chew and Peter Walker were defendants, and are of
84 opinion that, according to the "law of the State of New York," Peter Walker had such an interest in the subject of the action as to require his being made a party to said action; and further, that if Peter Walker, or his administratrix, were not brought into court, and not made parties to said action, that the judgment therein, according to the law aforesaid, has no effect upon the interest which said Walker, or

his administratrix, had in said bond and mortgage, is no bar as against them, and is not res adjudicata, or final, or conclusive, so far as Walker and his representatives are concerned.

PHILO T. RUGGLES,
Att'y & Counsellor at Law in the Supreme Court.
N. QUAD. PINTOS,
Att'y & Counsel of Supreme Court of New York.
J. M. BALDWIN,
Att'y & Counsellor of Supreme Court of New York.
A. P. MAN,
Of Man & Parsons, 64 Wall St.
J. M. MARTIN,
51 William St.

(Indorsed:) In chancery, N. J. Between Richard J. Brumagin, compl'nt, and Louisa Chew, def'nd't. Aff'ts and opinion. E. T. Green, sol'r. Filed July 9, 1868.

85 In chancery of N. J.

BETWEEN RICHARD J. BRUMAGIM, COMPL'T, *and* LOUISA CHEW, DEF'T. } On petition for rehearing.

The said defendant having filed her petition for a rehearing in the above-stated cause, and the matter coming on to be heard before his honor, the chancellor, at his chambers, in the city of Jersey City, in the presence of Edw. T. Green, of counsel for said complainant, and Edward P. Cowles, esq., (of the city of New York,) of counsel with the defendant, and the said petition and affidavits thereunto relating having been read, and the arguments of counsel thereon heard, and the chancellor having taken time to consider the same, and now being of opinion that the petition for a rehearing in the above-stated cause should not be granted,

It is, on this twenty second day of August, A. D. eighteen hundred and sixty-eight, ordered that the prayer of the said petition be denied, with costs.

86 And it is further ordered that the order heretofore made in this cause, staying all further proceedings, and bearing date the day of , now last past, be revoked and annulled.

A. O. ZABRISKIE, *C.*

(Indorsed:) Chancery of N. J. Richard J. Brumagim, compl't, and Louisa Chew, def't. Order denying prayer of partition, &c. E. T. Green, sol'r. Filed August 22, 1868.

87 In chancery of New Jersey.

BETWEEN RICHARD J. BRUMAGIM, COMPL'T, *and* LOUISA CHEW, DEF'T. } On bill to foreclose. Interlocutory decree.

This cause coming on to be heard at the term of October, now last past, at the State-house, in the city of Trenton, before his honor the chancellor, in the presence of Edward T. Green, of counsel with complainant, and A. V. Schenck, esq., of counsel with the defendant, and

the pleadings, depositions, exhibits, and proofs being read, and the arguments of the respective counsel being heard and considered, and the chancellor having taken time to advise thereon, and now on this twenty-second day of August, in the year of our Lord one thousand eight hundred and sixty-eight, being of opinion that the mortgage referred to in said pleadings should stand as security for so much of the principal of the bond in said mortgage referred to, as exceeds the amount of the judgment recovered in the action at law in the State of
88 New York, in said pleadings referred to, together with lawful interest upon such excess, and that the complainant is entitled to the relief by him prayed for,

It is, thereupon, on this twenty-second day of August aforesaid, ordered, that the said matter be referred to James S. Aitkin, esq., one of the masters of this court, to ascertain and report the amount due to the said complainant for principal and interest upon the mortgage held by him upon the premises mentioned and described in the said bill of complaint, after deducting therefrom such sum as by the proofs in this cause appears to have been recovered as aforesaid, in the said action at law in the State of New York, and to ascertain whether the said mortgaged premises should be sold separately or together; and if separately, in what order; and that the said master do make his report with all convenient speed. And all further equity is reserved until the coming in of the said master's report.

A. O. ZABRISKIE, *C.*

(Indorsed:) Chancery N. J. Rich. J. Brumagim, compl't, and Louisa Chew, def't. Order of reference. E. T. Green, sol. Filed August 22, 1868.

89 In chancery of New Jersey.

BETWEEN RICHARD J. BRUMAGIM, COMPL'T, *and* LOUISA CHEW, DEF'T. } Master's report, September 1st, 1868.

In pursuance of an order of this court, made in the above cause, bearing date on the twenty-second day of August, in the year of our Lord one thousand eight hundred and sixty-eight, whereby it was ordered that it be referred to the subscriber, one of the masters of this court, to ascertain and report the amount due to the complainant for principal and interest upon the mortgage held by him upon the premises mentioned and described in the bill of complaint, after deducting therefrom such sum as by the proofs in this cause appears to have been recovered in the action at law in the State of New York, and to ascertain whether the said mortgaged premises should be sold separately or together, &c.:

I, James S. Aitkin, one of the masters of this court, do hereby
90 report to his honor the chancellor that I have been attended by the solicitor of the complainant, and that in his presence I have examined the matters referred to me by the said order.

And I do report that I find, from an examination of the proofs in said cause, that there is due to the complainant on his said mortgage, for principal and interest, on this day, the sum of four thousand eight hundred and eighty-five dollars and fifty-two cents, ($4,885 52.)

And I do certify and report that the schedule hereunto annexed and making a part of this report contains a statement and account of the principal and interest money due to the complainant on his said mort-

gage, after deducting the amount recovered in the action at law in the State of New York, and to which schedule, for greater certainty, I refer.

And I do further certify and report that it is necessary and advisable that the whole of the mortgaged premises should be sold to raise and pay the money so due to the complainant, together with the costs of this suit.

All which is respectfully submitted.

Dated September 1, 1868.

JAMES S. AITKIN,
Master in Chancery.

91 SCHEDULE.

Bond of Robert Chew, dated the 13th day of March, 1851, in the penal sum of $7,000, conditioned to pay $3,500 on the 15th day of March, 1856, with interest at the rate of 6 per cent. per annum, and secured by the mortgage, Exhibit A; and which said bond and mortgage were duly assigned to complainant.

1851, March	13.	Amount of principal.....	$3,500 00
1859, April	11.	To interest thereon at 6 per cent., 8 years & 28 d'ys.....	1,696 32
" "		Amount due.....	5,196 32
" "		Credit am't recovered in suit in New York and satisfied.....	2,071 25
			$3,125 07
1868, September 1.		To interest on balance 9 years, 4 mo's, & 20 d'ys.....	1,760 45
" "		Total am't due complainant.....	$4,885 52

JAMES S. AITKIN, *M. C. C.*

(Indorsed:) In chancery N. J. Between Richard J. Brumagin, compl'nt, and Louisa Chew, def't. Master's report. E. T. Green, sol'r. Filed Sept. 2d, 1868. Master's fees: Making report, 1 34; draw'g do., 5 fo., 70; scheduling, 2 fo., 20—$2 24.

92 RICHARD J. BRUMAGIN, COMPL'NT, *and* LOUISA CHEW, DEF'ND'T. } Sept. 4, 1868.

Upon reading and filing a report made in this cause by James S. Aitkin, esquire, one of the masters of this court, and bearing date on the first day of September, in the year of our Lord one thousand eight hundred and sixty-eight:

It is ordered that the said report, and all the matters and things therein contained, do stand in all things confirmed, according to the tenor and true meaning thereof, unless the defendant shall, within eight days after service of a copy of this rule, show good cause to the contrary.

Entered by E. T. Green, solicitor of the complainant.

By the court:

BARKER GUMMERE, *Clk.*

93 In chancery of New Jersey.

BETWEEN RICHARD J. BRUMAGIM, COMPL'T, *and* LOUISA CHEW, DEF'T. } Affidavit of service.

STATE OF NEW JERSEY, *ss:*

Frederic U. Stevens, being duly sworn according to law, on his oath saith that, on the fourth day of September, in the year of our Lord one thousand eight hundred and sixty-eight, he served personally, at New Brunswick, a copy of the order made in the above-stated cause, dated September , 1868, confirming the report of James S. Aitkin, esquire, one of the masters of the said court of chancery, heretofore made in said cause, upon Abraham V. Schenck, esquire, solicitor of the said defendant.

F. U. STEVENS.

Sworn and subscribed at Trenton the ninth day of September, A. D. 1868, before me.

C. K. HALL, *M. C. C.*

(Indorsed:) In chancery of N. J. Between Richard J. Brumagim, compl't, and Louisa Chew, def't. Affidavit of service. E. T. Green, sol'r. Filed Sept. 10, 1868.

94 In chancery of New Jersey.

BETWEEN RICHARD J. BRUMAGIN, COMPL'NT, *and* LOUISA CHEW, DEFENDANT. } On bill, &c.—Final decree.

This cause coming on to be heard in the presence of Edward T. Green, solicitor, and of counsel with the complainant, and it appearing by an order of this court, made on the twenty-second day of August last, whereby it was referred to James S. Aitkin, esquire, one of the masters of this court, to ascertain and report the amount due to the said complainant for principal and interest upon the mortgage held by him upon the premises mentioned and described in the bill of complaint in this cause, after deducting therefrom such sum as by the proofs in this cause appears to have been recovered in the action at law in the State of New York, and whether the said mortgaged premises should be sold separately or together, and if separately, and in what
95 order; whereupon, and upon reading the report of the said James S. Aitkin, master as aforesaid, bearing date on the first day of September, in the year of our Lord one thousand eight hundred and sixty-eight, from all which it appears that there was due to the said complainant on his mortgage, after such deduction, the sum of four thousand eight hundred and eighty-five dollars and fifty-two cents, and that it is necessary and advisable that the whole of the mortgaged premises should be sold to raise and pay the money so due as aforesaid, together with the costs of this suit; and no cause being shown or appearing to the contrary,

It is, on this fourteenth day of September, in the year of our Lord one thousand eight hundred and sixty-eight, ordered, adjudged, and decreed by Abraham O. Zabriskie, chancellor of the State of New Jersey, and the said chancellor doth, by virtue of the power and author-

ity of this court, hereby order, adjudge, and decree that the said report, and all the matters and things therein contained, do stand ratified and confirmed, and that the said mortgaged premises be sold to raise
96 and satisfy the said sum of money due to the said complainant, that is to say, the sum of four thousand eight hundred and eighty-five dollars and fifty-two cents, together with lawful interest thereon, to be computed from the first day of September, in the year of our Lord one thousand eight hundred and sixty-eight, being the date of the master's report in this cause, with the complainant's costs to be taxed; and that a writ of fieri facias do issue forthwith out of this court, directed to the sheriff of the county of Middlesex, commanding him to make sale according to law of the said mortgaged premises, and that out of the money arising from such sale, he pay to the complainant or his solicitor his said debt, interest, and costs; and in case more money should be raised by the said sale than shall be sufficient to answer such payments, that such surplus be brought into this court, to abide the further order of the court, unless otherwise previously disposed of by the order of this court; and that the said sheriff make return without delay of his proceedings by virtue of the said writ.

97 And it is further ordered, adjudged, and decreed, that the defendant stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises, when sold as aforesaid by virtue of this decree.

A. O. ZABRISKIE, *C.*

(Indorsed:) In chancery, N. J. Between Richard J. Brumagin, compl'nt, and Louisa Chew, def'nd't. Final decree. E. T. Green, sol'r. Filed Sept. 14, 1868.

98 In chancery of New Jersey.

BETWEEN RICHARD J. BRUMAGIM, COMPL'T, *and* LOUISA CHEW, DEF'T. } On bill, &c.—Appeal.

The defendant hereby appeals from so much of the final decree made in this court, in the above-stated cause, as declares the mortgage assigned to and held by the complainant, in the pleadings in the cause mentioned, to be an existing incumbrance upon the mortgaged premises, in the said pleadings mentioned, and entitled to be paid and satisfied therefrom, to the court of appeals in the last resort in all causes of law.

AB'M V. SCHENCK,
Sol'r of Def't.
JNO. LINN, *of Counsel.*

I conceive there is good cause for appeal in the above-stated cause.
JNO. LINN,
Of Counsel with Def't.

Dated September 14th, 1868.

(Indorsed:) In chancery of N. J. Richard J. Brumagim vs. Louisa Chew. Appeal, &c. Ab'm V. Schenck, sol'r of def't. Filed Sept. 14, 1868.

99 In chancery of New Jersey.

BETWEEN RICHARD J. BRUMAGEM, COMPL'T, *and* LOUISA CHEW, DEF'T. } On petition for rehearing, &c.

It is ordered by the court, on motion of Abraham V. Schenck, sol'r of the defendant, that the exemplification of the judgment recovered in the State of New York, by Wood vs. Chew et al., and which said exemplification was made an exhibit on the part of the defendant in the said cause, and was annexed to her petition for a rehearing therein be delivered to the said defendant or her solicitor by the clerk of this court.

Dated February 2d, 1869.

A. O. ZABRISKIE, *C.*

(Indorsed:) In chancery of N. J. Brumagim v. Chew. Order, &c. Ab'm V. Schenck, sol'r. Filed February 2, 1869.

100 New Jersey court of errors & appeals.

BETWEEN LOUISA CHEW, APPELLANT, *and* RICHARD J. BRUMAGIN, APPELLEE. } On appeal from chancery.

This cause coming on to be heard at the term of March, in the year of our Lord one thousand eight hundred and seventy, and being argued by Edward P. Cowles, and A. V. Schenck, esquires, for the appellant, and Benjamin Williamson and Edward T. Green, esquires, for the appellee, and the court having taken time to consider the same, and being of the opinion that the decree of the chancellor should be affirmed in all things:

It is now, on this second day of April, in the year of our Lord eighteen hundred and seventy, ordered, adjudged, and decreed, that the decree of the chancellor be in all things affirmed with costs, and that the record and proceedings be remitted to the court of chancery, to be therein proceeded on according to law and the practice of said court.

On motion of—

EDW. T. GREEN,
Sol'r for Appellee.

101 STATE OF NEW JERSEY:

I, Horace N. Congar, secretary of state of the State of New Jersey, and ex-officio clerk of the court of errors and appeals in the last resort in all causes, do hereby certify the foregoing to be a true copy of an order made in the above-stated cause, as the same is taken from and compared with the minutes of said court.

In witness whereof I have hereunto set my hand and affixed my official seal this twenty-second day of April, A. D, eighteen hundred and seventy.

[L. S.] H. N. CONGAR.

(Indorsed:) Court of errors & appeals. Between Louisa Chew, appellant, and Richard J. Brumagin, appellee. On appeal—decree of remittitur. Edw. T. Green, sol'r of appellee. Filed April 22, 1870.

102 New Jersey court of errors & appeals.

BETWEEN LOUISA CHEW, APPELLANT, *and* RICHARD J. BRUMAGIN, RESPONDENT. } On bill, &c.—Appeal.—Costs of appellant.

	Sol.	Cl'k.
November term, 1868:		
Retaining fee & entering appeal	4 00	12
Drawing & engross. petition, & filing (9 fo.) 2 copies, & seal	2 70	2 16
Term fee	1 60	
Vacation & March term, 1869:		
Notice for hearing, copy & service, ent'y & filing	40	32
Motion for hearing & setting down cause	80	50
Attending court on mo. for hearing	1 50	
Term fee	1 60	
Vacation & June term, 1869:		
Notice for hearing, copy & service, ent'y & filing	40	32
Filing 29 papers from chancery		3 48
Term fee	1 60	
Vacation & March term, 1870:		
Notice for hearing, copy & service, &c	40	32
Motion for hearing	80	20
Attendance on motion	1 50	
Argument fee on final hearing, sol	6 00	
Drawing & engross. costs, copy, taxing & filing		1 76
	23 30	9 20
	9 20	
	$32 50	

I tax this bill of costs at thirty-two dollars and fifty cents.

H. N. CONGAR, *Clk.*

(Indorsed:) N. J. court of errors & appeals. Between Louisa Chew, appellant, and Richard J. Brumagin, respondent. On appeal—costs of appellant. A. V. Schenck, sol'r of appellant. Filed April 22, 1870.

103 New Jersey court of errors & appeals.

BETWEEN LOUISA CHEW, APPELLANT, *and* RICHARD J. BRUMAGIN, RESPONDENT. } On bill, &c.—Appeal.—Costs of resp'd't.

	Sol.	Cl'k.
November term, 1868:		
Retaining fee & ent'g appearance	4 00	12
Drawing & engross. answer to petition of appeal & filing	90	12
Term fee	1 60	
Vacation & March term, 1869:		
Attending court on notice for hearing	1 50	
Term fee	1 60	
Vacation & June term, 1869:		
Attendance on notice	1 50	
Term fee	1 60	
Vacation & March term, 1870:		
Attending court on motion for hearing	1 50	
Motion for decree	1 50	20
Motion for remittitur	1 50	20
Drawing & engross. decree, ent'g remittitur, filing, copy & seal	90	1 34
Argument fee on final hearing, sol	6 00	
Filing check-list, & receipt for papers		24
Drawing & engross. costs, copy, taxing & filing		1 76
	$24 10	3 99
	3 98	
	$28 08	

I tax this bill of costs at twenty-eight dollars and eight cents.

H. N. CONGAR.

(Indorsed:) N. J. court of errors & appeals. Between Louisa Chew, appellant, and Richard J. Brumagin, resdonpent. On appeal—costs of resp'd't. Edw. T. Green, sol'r of respondent. Filed April 22, 1870.

104 In chancery of New Jersey.

BETWEEN RICHARD J. BRUMAGIN, COMPL'T *and* LOUISA CHEW, DEFEND'T. } On bill, &c.—Filed April 22, 1870.—Compl'nt's costs.

	S. & C.	Chr.	Cl'k.	Als.
Feb'y term, 1864:				
Retaining fee, sol. & counsel	4 00			
Drawing & eng. bill, 45 fol	13 50			
Filing bill & ent'g action			32	
Drawing, eng., & sealing subp'a	40	40		50
Filing do & return & sheriff's fees			24	12
Drawing, taking, & filing aff't non res	20		12	12
Term fee, sol. & counsel	1 60			
May term, 1864:				
Motion for order, sub. sol	1 50	1 34		
Drawing, eng., & filing order, 2 fol			72	
Motion for order of pub	1 50	1 34		
Drawing, eng., & filing order, 3 fol. & copy			1 26	
Copy of ans			3 60	
Term fee, sol. & counsel	1 60			
Feb'y term, 1865:				
Drawing, eng., and filing rep	90		12	
Drawing & serving notice	40			
Counsel attending examiner	3 00			
Filing dep'ns & examiner's fees			12	1 80
Term fee, sol. & counsel	1 60			
May term, 1867:				
Drawing & serving notice	40			
Rule for hearing & setting down cause	80	75	82	
Counsel attending examiner	3 00			
Examiner's fees on cross-examination				90
Drawing & serving notice	40			
Rule for hearing & setting down cause	80	75	82	
May term, 1868:				
Drawing, taking, & filing aff't, &c	6 20		24	12
Drawing, taking, & filing aff't	2 60		12	12
Motion for order denying mo	1 50	1 34		
Argument fee	3 00			
Amounts over	$48 90	5 92	8 50	3 68
105 Amounts bro't over	$48 90	5 92	8 50	3 68
Drawing, eng., & filing order, 3 fol. & copy	90		36	
Motion for reference	1 50	1 34		
Drawing, eng., & filing order, 6 fol. & copy	1 80		60	
Argument fee on do	3 00			
Counsel attending master	3 00			
Filing report, &c., & master's fees			12	2 24
Rule confirming report, copy, & service	80	75	32	40
Drawing, taking, & filing proof service	20		12	12
Motion for final decree	80	75	32	
Counsel on hearing	4 00			
Chancellor on decree		2 50		
Drawing, eng., & filing decree, 9 fol			2 82	
Enrolling proceedings, 159 fol			12 72	
Feb'y term, 1870:				
Filing remittitur			24	
Filing costs, c't of E. & A			12	
Costs, c't of E. & A				28 08
Drawing, eng., tax'g, & filing costs, 11 fol. & copy			3 92	
	$64 90	11 26	30 16	34 52
	11 26			
	30 16			
	34 52			
	$140 84			

Taxed at one hundred and forty dollars and eighty-four cents.
April 22, 1870.

B. GUMMERE, *Clk.*

106 I, Barker Gummere, clerk of the court of chancery of the State of New Jersey, do hereby certify that the foregoing is a true copy of all the proceedings in the cause wherein Richard J. Brumagim is complainant, and Louisa Chew is defendant, now on the files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Trenton, this twelfth day of May, A. D. eighteen hundred and seventy.

[SEAL.] BARKER GUMMERE, *Clk.*

[Five-cent internal-revenue stamp affixed and canceled.]

(Indorsed:) In chancery, of N. J. Between Richard J. Brumagim, compl'n't, and Louisa Chew, def'd't. Transcript.

107 Supreme Court of the United States.

LOUISA CHEW, PL'FF IN ERROR,
vs.
RICHARD J. BRUMAGIM, DEF'T IN ERROR.

We stipulate & agree that the papers hereto annexed are true & perfect transcripts of the several exhibits put in evidence by the respective parties herein on the taking of the testimony under the pleadings herein in the court of chancery, of the State of New Jersey, and that such exhibits constituted a portion of the testimony in the case on which this cause was heard in said court of chancery, & was embraced in the record on which the said cause was heard upon the appeal from the decree of the court of chancery aforesaid to the court of errors & appeals &c., of the State of New Jersey.

And we further stipulate that the aforesaid transcripts of such exhibits with this stipulation be filed with the return to the afore-
108 said writ of error herein & be printed with such return, & have the same effect and be entitled to the same consideration as if embraced in said return as a part of the record or brought up to this court by writ of certiorari.

EDW. T. GREEN,
Sol'r & of Counsel with Def'ts in Error.
E. H. OWEN,
Sol'r & of Counsel for Plaintiff in Error.

109

110 *Exhibits for appellant.*

EXHIBIT A.

[L. S.] The people of the State of New York, by the grace of God, free and independent, to all to whom these presents shall come or may concern, greeting:

Know ye, that we, having examined the records and files in the office of the clerk of the county of New York, and clerk of the supreme court of said State for said county, do find a certain judgment-roll there remaining, in the words and figures following, to wit—

Supreme court, city and county of New York.

STEPHEN G. WOOD, PLAINTIFF,
against
ROBERT CHEW AND PETER WALKER, DEFENDANTS.

Summons for a money demand on contract.

To Robert Chew and Peter Walker, defendants:

You are hereby summoned to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on me, at No. 61 Chambers street, in the city of New York, within twenty days after the service thereof, exclusive of the day of such service, and if you fail to answer the said complaint aforesaid, the plaintiff will take judgment for the sum of four hundred and twenty dollars, with interest from the —— day of ——, one thousand eight hundred and ———, besides the costs of this action.

Dated April 25th, 1853.

BENJ. T. KISSAM,
Plaintiff's Attorney, No. 61 Chambers Street, New York.

111 Supreme court, city and county of New York.

STEPHEN G. WOOD, PLAINTIFF,
against
ROBERT CHEW AND PETER WALKER. DEFENDANTS.

The complaint of Stephen G. Wood, plaintiff in the above-entitled action, respectfully shows:

That, on or about the thirteenth day of March, one thousand eight hundred and fifty-one, he is informed and believes, the defendant Robert Chew made, executed, and delivered to the defendant Peter Walker his certain bond or obligation, bearing date the day and year aforesaid, in the penal sum of seven thousand dollars, conditioned for the payment of three thousand five hundred dollars, lawful money of the United States of America, on or before the fifteenth day of March, eighteen hundred and fifty-six, with interest thereon at the rate of six per cent. per annum, payable semi-annually.

That, on the 13th day of September, 1851, there became due and was payable one-half year's interest, amounting to the sum of one hundred and five dollars.

That, on the 13th day of March, 1852, there became due and was payable another half year's interest, amounting to the further sum of one hundred and five dollars.

That, on the 13th day of September, 1852, there became due and was payable another half year's interest, amounting to the further sum of one hundred and five dollars.

That, on the thirteenth day of March, one thousand eight hundred and fifty-three, there became due and was payable another half year's interest, amounting to the further sum of one hundred and five dollars, which said several sums of money accrued at the several times last aforesaid, as interest upon the aforesaid principal sum of three thousand five hundred dollars, and are still unpaid.

The said plaintiff has caused demand to be made upon the said defendant, Robert Chew, for payment of the said interest moneys, which the said defendant neglects and fails to pay.

And the said plaintiff further shows that, on or about the eighteenth day of November, one thousand eight hundred and fifty-one, the

112 said defendant Peter Walker made, executed, and delivered to the said plaintiff a certain paper writing, bearing date on that day, whereby he, the said Peter Walker, assigned, transferred, and set over to the said plaintiff the bond aforesaid, and also a mortgage bearing even date with said bond, made, executed, and delivered by the said Robert Chew to the said Peter Walker, as security for the payment of said bond; the assignment of said bond and mortgage being made to the said plaintiff as collateral security for the payment of the note of the said Peter Walker to the said plaintiff, bearing date the eighteenth day of November, 1851, with interest, in the sum of seventeen hundred dollars; and also for the payment of the further sum of two hundred dollars, advanced to the said Peter Walker on the sixteenth day of February, 1852, on the faith of said security, payable on the same day with the note aforesaid, to wit, on the eighteenth day of November, 1852, with interest, which two last-mentioned sums of money are still due from and unpaid by the said Peter Walker.

And the said plaintiff further shows that application has been made to the defendant Peter Walker to become a joint plaintiff in this action, and that he is made a defendant therein, because his consent to being a plaintiff could not be obtained.

Therefore the said plaintiff demands judgment against the said defendant Robert Chew for the sum of four hundred and twenty dollars, with interest on the sum of one hundred and five dollars, from the 13th day of September, 1851; on the further sum of one hundred and five dollars from the 13th day of March, 1852; on the further sum of one hundred and five dollars from the 13th day of September, 1852; and on the further sum of one hundred and five dollars from the 13th day of March, 1853; besides the costs of this action.

BENJ. T. KISSAM,
Plaintiff's Attorney, No. 61 Chambers Street.

CITY AND COUNTY OF NEW YORK, *ss:*

Stephen G. Wood, plaintiff in the within-entitled action, being duly sworn, says that the foregoing complaint is true of his own
113 knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

STEPHEN G. WOOD.

Sworn before me this 25th day of April, 1853.

LOUIS N. GLOVER,
Com'r of Deeds.

Supreme Court, city and county of New York.

STEPHEN G. WOOD
against
ROBERT CHEW AND PETER WALKER.

The amended answer of the above defendant Robert Chew, who is sued with Peter Walker, to the complaint of Stephen G. Wood, the above-named plaintiff, respectively shows to this court—

That the said defendant Robert Chew resides in the city and county of New York, but transacts business at Alexandria, in the State of Louisiana, and that while he was absent from the city of New York, in the year 1851, in the prosecution of his business, the said defendant, Peter Walker, published, or caused to be published, in certain newspa-

pers, printed and circulated in the city of New York and other places, to wit, the newspaper called "The New York Daily Tribune," and the newspaper called "The Sun," an advertisement in the words and figures following, viz:

"A Rare Chance. For sale. A first-rate farm, consisting of about 80 acres, known as the Summer Hill Farm, situated on the regular turnpike road from Washington, N. J., to Bordentown. The facilities to New York or Philadelphia are very great, as it is situated between two railways, viz, the Camden and Amboy and the Philadelphia line through New Brunswick. It is two miles from Spottswood depot, Camden and Amboy railroad; three miles from New Brunswick depot; and four from Washington steamboat landing, to which there is a splendid turnpike road, and at either place not over two and a half hours' travel to
114 and from New York. This land is in a very high state of cultivation, fences round extraordinary good, and suitable either for an agriculturalist or gentleman's seat. There are now over 8,000 peach trees in full bearing, and a good nursery of the same; 7 acres of a good vineyard of Isabella and Catawba grapes; 300 apple trees of the choicest sorts, and a variety of other fruits. The house is in good order, almost new, two stories high, and contains about eight rooms; a large barn, with cellar underneath, and other suitable out-houses. There are 7 acres of choice chestnut and oak timber. In fact, it is a chance seldom met with. For further particulars, enquire of C. Underhill, 32 New Washington Market, or to C. B. Batteson, 351 Broome street, or to W. Wright, 22 Ann street, New York, from 10 a. m. to 2 p. m."

And that the wife of this defendant, residing in the city of New York, or some other person, enclosed or sent the said advertisement to this defendant, at Alexandria aforesaid, this defendant then being desirous of purchasing a farm near the city of New York, for a residence for his brother-in-law and his family, which fact was known to this defendant's wife, or the person who sent the said advertisement to this defendant, and requested to be informed whether this defendant wished to purchase the farm mentioned in the said advertisement; that this defendant, after the receipt of the said advertisement, authorized his wife, who transacted his business in the city of New York, to purchase the said farm, relying upon the description given of the same in the said advertisement.

And this defendant further says that he is informed and believes, and so states the fact to be, that the said defendant Peter Walker, during the negotiation for the purchase of the said farm, &c., the time the purchase of the same was concluded for this defendant, assured, represented, and stated to the agent of this defendant, that the said farm was situated and in all respects corresponded with, and was in all respects equal to the description made of the said farm in the said advertisement, and that the said farm was worth more than the sum of seven thousand dollars, the price to be paid for the same.

And this defendant further says, that the said farm was pur-
115 chased for this defendant upon the description given of the same in the said advertisement, and the aforesaid representations and assurances made by the said defendant Peter Walker at the time of the negotiation and purchase, that the said farm was situated and in all respects corresponded with, and was equal to, the description made of the said farm in the aforesaid advertisement, for the sum of seven thousand dollars; and that the said defendant Peter Walker agreed to convey the said farm to this defendant in fee simple, free and clear from

all encumbrances of every nature and kind, by a deed of conveyance containing full covenants of seizin and right to sell, quiet enjoyment, averments of title, together with the usual covenants in a deed of conveyance, containing the warrantee of title; and that the said defendant Peter Walker represented and assured this defendant's agent, as this defendant is informed and believes, at the time of the said purchase, that the said farm was situated and in all respects in the condition stated in the said advertisement; that the lands were in a high state of cultivation, and the fences around extraordinary good; and that the said farm contained the number of acres mentioned in the said advertisement; and that there was on the said farm the number of peach and apple trees mentioned in the said advertisement, in the condition mentioned therein; and that there was on the said farm a vineyard of Isabella and Catawba grapes, containing the number of acres in the condition mentioned in the said advertisement; that the house on the said farm was in good order, almost new, two stories high, containing about eight rooms; and that the place was watered with first-rate water by two pumps, the one at the house door, and the other near the new barn, and sufficient stock water on the premises; and that there was on the said farm a large barn with a cellar underneath, and other suitable outhouses; that there were seven acres of choice chestnut and oak timber on the said farm; and that the amount of fruit on the said farm has averaged in the neighborhood of three thousand dollars a year for the last seven years; and that the said farm was worth more than the sum of seven thousand dollars, the consideration to be paid for the same; that the consideration money for the said farm was paid and secured as follows, viz:

116 Fifteen hundred dollars was paid in cash on the delivery of the deed; and this defendant, in the conveyance of the said farm, assumed the payment of a mortgage, executed by the said Peter Walker, and a person described in the said deed of conveyance as Catharine Walker, the wife of the said Peter Walker, to the executors of the last will and testament of John Bray, deceased, to secure the payment of the sum of two thousand dollars, with interest thereon at the rate of six per cent. a year, bearing date the first day of October, in the year one thousand eight hundred and forty-seven; and a bond and mortgage was executed in the name of this defendant to secure the balance of the said consideration money, viz, the sum of three thousand five hundred dollars, payable on or before the fifteenth day of March, in the year one thousand eight hundred and fifty-six, with interest thereon at the rate of six per cent. a year, payable half yearly.

And this defendant further says, that after he had returned to the city of New York from Alexandria, in the State of Louisiana aforesaid, where he transacts business during the period from October to July following in each year, and after the cash consideration had been paid for the purchase of the said farm, and the deed had been delivered for the said farm, and the bond and mortgage to secure the sum of three thousand five hundred dollars had been executed and delivered, and the whole purchase completed, on visiting the said farm he found that the representations made in the said advertisement published by the said defendant Peter Walker, as aforesaid, and the representations made by the said defendant, Peter Walker, as aforesaid, upon which the purchase was made by the agent for this defendant, and which were entirely relied upon in the purchase of the said farm, were false and fraudulent in each and every of the particulars mentioned in the said advertisement, and in the said representations upon which the said farm

was purchased for this defendant, and that the said farm does not contain the number of acres mentioned in the said advertisement, and is situate more than seven miles from the New Brunswick depot; that the land was very much worn out and not in a good state of cultivation; that the fences on the said farm were in bad condition; that there
117 were not two thousand peach trees in bearing condition on the said farm; that the vineyard was only about three acres; that there were only about one hundred apple trees on the said farm; that the house on the said farm was an old dilapidated house, containing only two rooms; that the said farm was not well watered, there being only one well, and the water in that unfit for use for any purpose; that there were only about four acres of chesnut and oak timber on the said farm; and that the title to the said farm, made by the said defendant Peter Walker, and the person the said defendant Peter Walker represented as his wife, is imperfect; that the said Peter Walker, at the time of making the said deed of conveyance, falsely and wickedly withheld from the agent of this defendant that he had a wife to whom he had been lawfully married, by the name of Sarah Walker, residing at Manchester in England, who is still living, and who, on the death of the said Peter Walker, will, as this defendant is informed and believes, be entitled to an estate in dower in the said farm, or some part thereof; and that the person who signed the said deed, by the name of Catharine Walker, was not the lawful wife of the said Peter Walker, but a person with whom the said Peter Walker was living, and falsely, fraudulently represented, and passed as his wife.

And this defendant further says that by the false and fraudulent representations made and published by the said defendant Peter Walker, as aforesaid, in the said advertisement, and the representations falsely made by the said defendant Peter Walker, as aforesaid, upon which this defendant's agent purchased the said farm, this defendant has been greatly deceived and defrauded in the purchase of the said farm and the title to the same; that the said farm, at the time the same was purchased by this defendant, with the title executed to this defendant by the said defendant Peter Walker, and the person he falsely represented to be his wife was not worth more than the sum of three thousand five hundred dollars, the amount paid in cash on the purchase of the said farm, and the amount of the mortgage mentioned in the deed of conveyance executed to this defendant by the said Peter Walker, and the payment thereof assumed by this defendant; and this defendant
118 claims to recoup and set off the damages sustained by this defendant by reason of the aforesaid false and fraudulent representations made by the said Peter Walker as to the situation and condition of the said farm and improvements thereon, under which the said farm was purchased by this defendant, and the said fraud and defect in the title to the same executed to this defendant, against the said sum of money, and the interest thereon, claimed in the said bond and mortgage mentioned in the said complaint; and this defendant says, that he has not any knowledge or information sufficient to form a belief, and therefore cannot say whether the said plaintiff is the assignee of the said bond and mortgage stated in the said complaint and for the purposes therein stated.

And this defendant further answering says that he denies that there is any money due to the said Peter Walker, or to the said plaintiff as assignee, for principal and interest on the said bond and mortgage so fraudulently obtained from this defendant.

And this defendant further answering says that he denies that he is

indebted to the said plaintiff in the amount claimed by him in the said complaint, or in any other sum of money whatever.

And this defendant further answering says that, shortly after his return to the city of New York, from Alexandria aforesaid, and the examination of the said farm, this defendant was informed, and believes to be true, that the said Peter Walker was, and now is, utterly insolvent and unable to refund to this defendant the amount of the consideration money paid by this defendent on the purchase of the said farm and to restore this defendant to the condition he was in when the said farm was purchased.

R. CHEW.
WILLIAM S. SEARS,
Attorney for Defendant, R. Chew.

CITY AND COUNTY OF NEW YORK, *ss:*

Robert Chew, of the said city, the above-named defendant, being duly sworn, says that he has heard read the foregoing amended answer, and knows the contents thereof, and that the same is true of his own
119 knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

R. CHEW.

Sworn before me this 29th day of September, 1853.

EDW'D N. ROGERS,
Com'r of Deeds.

Supreme court, city and county of New York.

STEPHEN G. WOOD
against
ROBERT CHEW AND PETER WALKER. } Reply.

Stephen G. Wood, in reply to the amended answer of the said defendant, Robert Chew, says:

He denies having any knowledge or information sufficient to form a belief as to the said defendant Robert Chew transacting business at Alexandria, in the State of Louisiana, or as to his being absent from the city of New York in the year 1851, in the prosecution of his business, or for any purpose, or as to the defendant Peter Walker, at that or any other time, publishing or causing to be published in the newspapers called "The New York Daily Tribune," and the "Sun," or any other newspapers, the advertisement mentioned and set forth in said amended answer, or any other advertisement.

He denies having any knowledge or information sufficient to form a belief of the wife of said defendant Chew, or some other person, enclosing or sending the said alleged advertisement to the said defendant Chew, at Alexandria aforesaid, or of the said defendant Chew being then desirous of purchasing a farm near the city of New York, as a residence for his brother-in-law and family, or of such alleged desire being known to his (Chew's) wife, or to the person who sent the said alleged advertisement, or of the request for information respecting defendant Chew's wish to purchase.

He denies having any knowledge or information sufficient to form a belief of the defendant Chew authorizing his wife to purchase,
120 after the alleged receipt of the said alleged advertisement, or of

his (Chew) relying upon the description given in said alleged advertisement.

He denies having any knowledge or information sufficient to form a belief of the defendant Peter Walker, pending the negotiations for the purchase, or when the purchase was concluded, or at any time whatever, assuring, representing, and stating to the agent of said defendant Chew that the said farm was situated, or in all respects corresponded with, or was in all respects equal to, the description of the said farm in the said alleged advertisement, or of his representing said farm to be worth more than seven thousand dollars.

He denies having any knowledge or information sufficient to form a belief of the said farm being purchased for said defendant Chew, upon the description given of the same in said alleged advertisement, or upon the alleged representations and assurances made, as is alleged by the said defendant Peter Walker, at the time of the negotiation and purchase.

He denies having any knowledge or information sufficient to form a belief of the defendant Peter Walker agreeing to convey the said farm to said defendant Chew, in fee simple, free and clear from all encumbrances of every nature and kind, by a deed of conveyance containing full covenants of seizen and right to sell, quiet enjoyment, averments of title, together with the usual covenants in a deed of conveyance containing the warranty of title.

He denies having any knowledge or information sufficient to form a belief of the defendant Peter Walker representing and assuring defendant Chew's agent, at the time of the said purchase or at any other time, that the said farm was situated, or in all respects in the condition stated in the said alleged advertisement, or that the lands were in a high state of cultivation, or the fences around extraordinarily good, or that said farm contained the number of acres mentioned in the said alleged advertisement, or that there was on said farm the number of peach and apple trees mentioned in the said alleged advertisement, in the condition mentioned therein, or that there was on the said farm a vineyard of Isabella and Catawba grapes, containing the number of acres in the condition mentioned in the said alleged advertisement, or that the
121 house on the said farm was in good order, almost new, two stories high, containing about eight rooms; or that the place was watered with first-rate water by two pumps, one at the house door, and the other near the new barn, or sufficient stock water on the premises; or that there was on the said farm a large barn, with a cellar underneath, or other suitable out-houses; or that there were seven acres of choice chestnut and oak timber on the said farm, or that the amount of fruit on the said farm has averaged in the neighborhood of three thousand dollars a year for the last seven years; or that the said farm was worth more than the sum of seven thousand dollars, the consideration to be paid for the same.

He denies having any knowledge or information sufficient to form a belief of the said defendant Chew's return from Alexandria, in the State of Louisiana, or of his transacting business there during the period from October to July, in each year, or of his finding, after his alleged return, and after the cash consideration had been paid for the purchase of the said farm, and the bond and mortgage to secure the sum of three thousand five hundred dollars had been executed and delivered, and the whole purchase completed, on visiting the said farm, that the alleged representations made in the said alleged advertisement, and the alleged representations of the said Peter Walker, were false and fraudulent in

each and every of the particulars mentioned in the said alleged advertisement, and in the said alleged representations, or of any reliance being placed upon the alleged representations mentioned and set forth in said answer, or of said alleged representations being false and fraudulent in any manner.

He denies having any knowledge or information sufficient to form a belief of the said farm not containing the number of acres mentioned in the said advertisement, or of its being situated more than seven miles from the New Brunswick depot, or of the land being very much worn out, or not being in a good state of cultivation, or of the fences on said farm being in a bad condition, or of there not being two thousand peach trees in bearing condition on the said farm, or of the vineyard being only about three acres, or of there being only about one hundred apple trees on the said farm, or of the house on the said farm being an old dilapidated house, containing only two rooms; or of the said farm not being very well watered, or of there being only one well, or of the
122 water in that unfit for use for any purpose, or of there being only about four acres of chestnut and oak timber on the said farm, or of the title to said farm being imperfect.

He denies having any knowledge or information sufficient to form a belief of the said Peter Walker's having a wife, to whom he had been lawfully married, by the name of Sarah Walker, residing at Manchester, in England, still living; or of the person who signed the said deed, by the name of Catharine Walker, not being the lawful wife of the said Peter Walker, or of Peter Walker's falsely and fraudulently representing and passing her as his wife, or of the said Walker at the time of making said deed of conveyance, or at any other time, falsely and wickedly, or in any manner whatever, withholding from the agent of said Chew that he (Walker) had a wife to whom he had been lawfully married, as is alleged, by the name of Sarah Walker, or of the person who signed the said deed, by the name of Catharine Walker, not being the lawful wife of the said Peter Walker, as is alleged, but a person with whom the said Peter Walker was living, and falsely and fraudulently representing and passed as his wife, as is alleged.

He denies having any knowledge or information sufficient to form a belief of the said defendant Chew being greatly, or in any manner, deceived or defrauded in the purchase of the said farm, or the title to the same, by the alleged false and fraudulent representations made by the said Peter Walker, as is alleged in said answer, or any other representations made by said Walker.

He denies, on information and belief, that said farm was not worth over three thousand five hundred dollars at the time the same was purchased by defendant Chew, with the title executed to him by the said Peter Walker, and the person he falsely represented, as is alleged, to be his wife.

He denies having any knowledge or information sufficient to form a belief of said Peter Walker being, at the time stated in said amended answer, or at any other time, utterly insolvent, or unable to refund to defendant Chew the amount of the consideration money paid by him, and to restore him to the condition he was in when said farm was purchased.

And for a further reply to said amended answer the said
123 plaintiff says he is informed and believes that the aforesaid agent of the defendant Chew, together with several relations or friends, previous to the completion of the purchase of said farm, visited the same at several different times, and made a personal examination of the same,

and of everything appertaining thereto, and also inquired of experienced persons relative to the same, for and on behalf of said defendant Chew.

And for a further reply to said amended answer, the said plaintiff says that previously to advancing the money mentioned in the complaint, and taking an assignment of the said bond and mortgage as stated therein, he called upon the agent aforesaid of the defendant Robert Chew to ascertain whether he could safely make a purchase of the said securities, and said agent informed said plaintiff that he could safely advance the sum of seventeen hundred dollars or thereabouts upon the same, relying upon which the said plaintiff accordingly did advance, loan, and pay to the defendant Peter Walker the several sums of money mentioned in the said complaint.

BENJ. T. KISSAM,
Plaintiff's Attorney, 61 *Chambers Street.*

CITY AND COUNTY OF NEW YORK, *ss:*

Stephen G. Wood, the plaintiff in the above-entitled action, being duly sworn, deposes and says that the foregoing reply is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

STEPHEN G. WOOD.

Sworn before me this 3d day of November, 1853.

H. C. BANKS,
Com'r of Deeds.

124 Supreme court.

STEPHEN G. WOOD
against
ROBERT CHEW AND ANOTHER.

It is hereby stipulated and agreed that the above action be continued against Catharine Walker, administratrix of the goods, chattels, and effects of Peter Walker, deceased, one of the defendants in the above-entitled action, and that an order be entered accordingly.

It is further stipulated that the testimony of James R. Magee and Joseph Chappel, two of the plaintiff's witnesses, now attending court from the State of New Jersey, be taken de bene esse, at the office of William S. Sears, esq., No. 85 Chambers street, New York, on the 21st day of March, 1856, at one o'clock in the afternoon of that day.

And it is further stipulated and agreed that the plaintiff in the above action shall be entitled to the same relief upon the trial thereof as though he had served a supplemental complaint, setting forth the facts that since the commencement of the action, the principal sum mentioned in the condition of the bond set forth in the original complaint herein has become due and payable according to the terms of said bond, and that interest on said principal sum has accrued since the 13th day of March, 1853. The defendant Chew to be entitled to the same defence he would have been entitled to if such supplemental complaint had been served on him, and also to any defence he may be legally entitled to have or set up by reason of the death of the defendant Peter Walker.

WILLIAM S. SEARS,
Attorney for Defendant Chew.
BENJ. T. KISSAM,
Plaintiff's Attorney.

Dated March 20th, 1856.

125 Supreme court.

STEPHEN G. WOOD
against
ROBERT CHEW AND ANOTHER. } Circuit court, March 20, 1856.

Present, Hon J. J. Roosevelt.

The above-entitled action having been called this day in its regular order on the day calendar, and the plaintiff being ready for trial, but the defendant Chew moving for a postponement, and counsel for the respective parties being heard:

Now, ordered, that the trial of said action be postponed until the second Tuesday of April, 1856, upon the defendant Chew stipulating as follows: That the above action shall be continued against Catharine Walker, administratrix of the goods, chattels, and effects of Peter Walker, deceased, in place of said Peter Walker, deceased; that the testimony of the plaintiff's witnesses now in attendance at this circuit court shall be taken on the 21st day of March, inst., de bene esse. And that the plaintiff shall be entitled to the same relief upon the trial of this action as though he had served a supplemental complaint, setting forth the facts that since the commencement of this action the principal sum mentioned in the condition of the bond set forth in the original complaint has become due and payable, and also that interest has accrued on said last-mentioned principal sum since the 13th day of March, 1856, the defendant Chew to be entitled to the same defence he would have been entitled to if such supplemental complaint had been served upon him.

(Copy.) RICHARD B. CONNOLLY, *Clerk.*

At a circuit court of the supreme court, held at the city hall, in the city of New York, on the 20th day of March, 1856.

Present, Hon. J. J. Roosevelt, justice.

126 STEPHEN G. WOOD
against
ROBERT CHEW AND PETER WALKER. }

It appearing to this court, by the affidavit of Catharine Walker, that Peter Walker, one of the above-named defendants, is deceased:

Now, on reading stipulation of defendant Chew, and on reading and filing said affidavit, and on motion of Benjamin T. Kissam, plaintiff's attorney:

It is ordered, that said action be, and the same is hereby continued against Catharine Walker, administratrix of the goods, chattels, and effects of the said Peter Walker, deceased.

(Copy.) RICHARD B. CONNOLLY, *Clerk.*

Supreme court, city and county of New York.

STEPHEN G. WOOD
against
ROBERT CHEW AND ANOTHER. } Circuit court, October 14th, 1856.

Hon. H. E. Davies, justice.

On reading and filing affidavit of William S. Sears, esq., and order to

show cause, dated October 6th, 1856, and also the affidavit of Benjamin T. Kissam, on behalf of plaintiff:

It is ordered that the plaintiff file and serve a supplemental complaint, in accordance with the stipulation and order of 20th March, 1856, nunc pro tunc, as of said last-mentioned date, within three days from the date of this order, and that the defendant Chew file and serve a supplemental answer to said complaint, in accordance with the said stipulation and order of the 20th March, 1856, nunc pro tunc, as of said last-mentioned date, within three days after service of said supplemental complaint, and that the clerk of this court insert said supplemental complaint and supplemental answer in the judgment-roll filed in the above action.

(Copy.) RICHARD B. CONNOLLY, *Clerk.*

127 Supreme court, city and county of New York.

STEPHEN G. WOOD
against
ROBERT CHEW AND CATHARINE WALKER, administratrix of Peter Walker, deceased. } Supplemental complaint.

By virtue of an order made in the above-entitled action on the twentieth day of March, 1856, and a stipulation of the parties, plaintiff and defendant, Robert Chew, the said plaintiff, by way of supplement to his complaint made in said action, on the twenty-fifth day of April, 1853, and in file with the clerk of the city and county of New York, states to the court that since the commencement of said action, and since the date of such original complaint, the following facts have occurred, addition to those mentioned and set forth in said original complaint, namely:

That on the 13th day of September, 1853, there became due and was payable another half year's interest on the principal sum mentioned in the condition of the bond set forth in said original complaint, amounting to the sum of one hundred and five dollars.

That on the 13th day of March, 1854, there became due and was payable another half year's interest on the principal sum aforesaid, amounting to the further sum of one hundred and five dollars.

That on the 13th day of September, 1854, there became due and was payable another half year's interest on the principal sum aforesaid, amounting to the further sum of one hundred and five dollars.

That on the 13th day of March, 1855, there became due and was payable another half year's interest on the principal sum aforesaid, amounting to the further sum of one hundred and five dollars.

That on the 13th day of September, 1855, there became due and was payable another half year's interest on the prin sum aforesaid, amounting to the further sum of one hundred and five dollars.

128 That on the 13th day of March, 1856, there became due and was payable another half year's interest on the principal sum aforesaid, amounting to the further sum of one hundred and five dollars.

And that on the 15th day of March, 1856, the principal sum of three thousand five hundred dollars, mentioned in the condition of said bond by the terms thereof, also became due and payable.

That no portion of said principal sum of three thousand five hundred dollars, nor any interest thereon, has ever been paid, and said defend-

ant Robert Chew, although frequently requested to pay the same, wholly neglects and refuses so to do.

The plaintiff, therefore, demands judgment against the said defendant Robert Chew for the sum of three thousand five hundred dollars, with interest from the thirteenth day of March, one thousand eight hundred and fifty-one, besides the costs of this action.

BENJ. T. KISSAM,
Plaintiff's Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

Stephen G. Wood, plaintiff in the above action, being duly sworn, deposes and says the foregoing supplemental complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

STEPHEN G. WOOD.

Sworn before me this 15th day of May, 1856.

LOUIS M. GLOVER,
Com'r of Deeds.

Supreme court, city and county of New York.

STEPHEN G. WOOD *against* ROB'T CHEW AND CATHARINE WALKER, administratrix of Peter Walker, deceased.	Copy answer to supplemental complaint, under order of March 20, 1856.

The answer of the above defendant Robert Chew, who is sued
129 with Catharine Walker, administratrix, &c., of Peter Walker, deceased, to the supplemental complaint of Stephen G. Wood, the above-named plaintiff, respectfully shows to this court:

That the said defendant Robert Chew, resides in the city and county of New York, but transacts business at Alexandria, in the State of Louisiana, and that while he was absent from the city of New York, in the year 1851, in the prosecution of his business, the said Peter Walker published, or caused to be published, in certain newspapers printed and circulated in the city of New York, and other places, to wit, the newspaper called "The New York Daily Tribune," and the newspaper called "The Sun," an advertisement, in the words and figures following, viz, "A Rare Chance. For sale. A first-rate farm, consisting of about 80 acres, known as the Summer Hill Farm, situated on the regular turnpike road from Washington, N. J., to Bordentown. The facilities to New York or Philadelphia are very great, as it is situated between two railways, viz, The Camden and Amboy, and the Philadelphia line, through New Brunswick. It is two miles from Spottswood depot, Camden and Amboy railroad, three miles from New Brunswick depot, and four from Washington steamboat landing, to which there is a splendid turnpike road, and at either place not over two-and a-half hours' travel to and from New York. This land is in a very high state of cultivation; fences round extraordinary good, and suited either for an agriculturist or gentleman's seat. There are now over 8,000 peach trees in full bearing, and a good nursery of the same; 7 acres of a good vineyard of Isabella and Catawba grapes; 300 apples trees of the choicest sorts, and a variety of other fruits. The house is in good order, almost new, two stories high, and contains about eight rooms; a large barn, with cellar underneath, and other suitable out-houses. There are 7 acres of choice

chestnut and oak timber. In fact it is a chance seldom met with. For further particulars inquire of C. Underhill, 32 New Washington market, or to C. B. Batterson, 351 Broome street, or to W. Wright, 22 Ann street, New York, from 10 a. m. to 2 p. m.;" and that the wife of this defendant, residing in the city of New York, or some other person, enclosed
130 or sent the said advertisement to this defendant, at Alexandria aforesaid; this defendant then being desirous of purchasing a farm, near the city of New York, for a residence for his brother-in-law and his family, which fact was known to this defendant's wife, or the person who sent the said advertisement to this defendant, and requested to be informed whether this defendant wished to purchase the farm mentioned in the said advertisement; that this defendant, after the receipt of the said advertisement, authorized his wife to purchase the said farm, relying upon the description given of the same in the said advertisement.

And this defendant further says that he is informed and believes, and so states the fact to be, that the said Peter Walker, during the negotiation for the purchase of the said farm, and at the time the purchase of the same was concluded for this defendant, assured, represented, and stated to the agent of this defendant, that the said farm was situated, and in all respects corresponded with, and was in all respects equal to, the description made of the said farm in the said advertisement, and that the said farm was worth more than the sum of seven thousand dollars, the price to be paid for the same.

And this defendant further says that the said farm was purchased for this defendant upon the description given of the same in the said advertisement, and the aforesaid representations and assurances made by the said Peter Walker at the time of the negotiation and purchase; that the said farm was situated, and in all respects corresponded with, and was equal to, the description made of the said farm in the aforesaid advertisement, for the sum of seven thousand dollars; and that the said Peter Walker agreed to convey the said farm to this defendant in fee simple, free and clear from all encumbrances of every nature and kind, by a deed of conveyance, containing full covenants of seizin and right to sell, quiet enjoyment, averments of title, together with the usual covenants in a deed of conveyance, containing the warranty of title; and that the said Peter Walker represented and assured this defendant's agent, as this defendant is informed and believes, at the time of the said purchase, that the said farm was situated and in all respects in
131 the condition stated in the said advertisement; that the lands were in a high state of cultivation, and the fences around extraordinarily good, and that the said farm contained the number of acres mentioned in the said advertisement, and that there was on the said farm the number of peach and apple trees mentioned in the said advertisement in the condition mentioned therein; and that there was on the said farm a vineyard of Isabella and Catawba grapes, containing the number of acres in the condition mentioned in the said advertisement; that the house on the said farm was in good order, almost new, two stories high, containing about eight rooms, and that the place was watered with first-rate water by two pumps, the one at the house door and the other near the new barn, and sufficient stock water on the premises; and that there was on the said farm a large barn with a cellar underneath, and other suitable out-houses; that there were seven acres of choice chestnut and oak timber on the said farm; and that the amount of fruit on the said farm has averaged in the neighborhood of three thousand dollars a year for the last seven years; and that the said farm was

worth more than the sum of seven thousand dollars, the consideration to be paid for the same; that the consideration money for the said farm was paid and secured as follows, viz: fifteen hundred dollars was paid in cash on the delivery of the deed, and this defendant, in the conveyance of the said farm, assumed the payment of a mortgage, executed by the said Peter Walker, and a person described in the said deed of conveyance as Catharine Walker, the wife of the said Peter Walker, to the executors of the last will and testament of John Bray, deceased, to secure the payment of the sum of two thousand dollars, with interest thereon, at the rate of six per cent. a year, bearing date the first day of October, in the year one thousand eight hundred and forty-seven; and a bond and mortgage was executed in the name of this defendant to secure the balance of the said consideration money, viz, the sum of three thousand five hundred dollars, payable on or before the fifteenth day of March, in the year one thousand eight hundred and fifty-six, with interest thereon at the rate of six per cent. a year, payable half yearly.

And this defendant further says that, after he had returned to
132 the city of New York, from Alexandria, in the State of Louisiana aforesaid, where he transacted business during the period from October to July following in each year, and after the cash consideration had been paid for the purchase of the said farm, and the deed had been delivered for the said farm, and the bond and mortgage to secure the sum of three thousand five hundred dollars had been executed and delivered, and the whole purchase completed, on visiting the said farm he found that the representations made in the said advertisement, published by the said Peter Walker, as aforesaid, and the representations made by the said Peter Walker, as aforesaid, upon which the purchase was made by the agent for this defendant, and which were entirely relied upon in the purchase of the said farm, were false and fraudulent in each and every of the particulars mentioned in the said advertisement, and in the said representations upon which the said farm was purchased for this defendant; and that the said farm does not contain the number of acres mentioned in the said advertisement, and is situate more than seven miles from the New Brunswick depot; that the land was very much worn out, and not in a good state of cultivation; that the fences on the said farm were in bad condition; that there were not two thousand peach trees in a bearing condition on the said farm; that the vineyard was only about three acres; that there were only about one hundred apple trees on said farm; that the house on the said farm was an old dilapidated house, containing only two rooms; that the said farm was not well watered, there being only one well, and the water in that unfit for use for any purpose; that there were only about four acres of chestnut and oak timber on the said farm; and that the title to the said farm, made by the said Peter Walker, and the person the said Peter Walker represented as his wife, is imperfect; that the said Peter Walker, at the time of making the said deed of conveyance, falsely and wickedly withheld from the agent of this defendant, that he had a wife to whom he had been lawfully married, by the name of Sarah Walker, residing at Manchester, in England, who is still living, and who, at the death of the said Peter Walker, became, as this defendant is informed and believes, entitled to an estate in dower in the said farm, or some part thereof; and that the person who signed the said deed, by
133 the name of Catharine Walker, was not the lawful wife of the said Peter Walker, but a person with whom the said Peter Walker was living, and falsely and fraudulently represented and passed for his wife.

And this defendant further says that, by the false and fraudulent representations made and published by the said Peter Walker, as aforesaid, in the said advertisement, and the representations falsely made by the said Peter Walker, as aforesaid, upon which this defendant's agent purchased the said farm, this defendant has been greatly deceived and defrauded in the purchase of the said farm and the title to the same; that the said farm, at the time the same was purchased by this defendant, with the title executed to this defendant by the said Peter Walker and the person he falsely represented to be his wife, was not worth more than the sum of three thousand five hundred dollars, the amount paid in cash on the purchase of the said farm, and the amount of the mortgage mentioned in the deed of conveyance executed to this defendant by the said Peter Walker, and the payment thereof assumed by this defendant. And this defendant claims to recoup and set off the damages sustained by this defendant by reason of the aforesaid false and fraudulent representations made by the said Peter Walker as to the situation and condition of the said farm and improvements thereon, under which the said farm was purchased by this defendant, and the said fraud and defect in the title to the same, executed to this defendant, against the said sum of money and the interest thereon, claimed in the said bond and mortgage mentioned in the said complaint. And this defendant says that he has not any knowledge or information sufficient to form a belief, and therefore cannot say whether the said plaintiff is the assignee of the said bond and mortgage stated in the said complaint, for the purposes therein stated.

And this defendant further answering says that he denies that there is any money due to the said Catharine Walker, administratrix of Peter Walker, or to the said plaintiff as assignee, for principal and interest on the said bond and mortgage so fraudulently obtained from this defendant.

And this defendant further answering says that he denies that
134 he is indebted to the said plaintiff, in the amount claimed by him in the said supplemental complaint, or in any other sum of money whatever, or any interest thereon.

And this defendant further answering says that, shortly after his return to the city of New York from Alexandria, aforesaid, and the examination of the said farm, this defendant was informed, and believes to be true, that the said Peter Walker was utterly insolvent, and unable to refund to this defendant the amount of the consideration money paid by this defendant on the purchase of the said farm, and to restore this defendant to the condition he was in when the said farm was purchased.

R. CHEW.

CITY AND COUNTY OF NEW YORK, *ss:*

Robert Chew, of the said city, the above-named defendant, being duly sworn, says that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated in information and belief, and as to these matters he believes it to be true.

R. CHEW.

Sworn before me this 7th day of September, 1857.

P. MILLSPAUGH,
Com'r of Deeds.

Supreme court, circuit, March 12th, 1859.

STEPHEN G. WOOD
against
ROBERT CHEW, IMPLEAD.

Present, Hon. Henry E. Davies, justice.

I hereby certify that this cause was this day tried by the court and a jury, and a verdict rendered therein for the plaintiff for the sum of two thousand and seventy-one $\frac{25}{100}$ dollars, ($2,071 25.)

JOHN CLANCY, *Clerk.*

135 Supreme court, city and county of New York.

STEPHEN G. WOOD
against
ROBERT CHEW, IMPLEAD., &C.

Judgment April 6th, 1859.

The issues joined in the above-entitled action having been heretofore tried at a circuit court held in and for the city and county of New York, at the city hall, in the city of New York, by the Hon. Henry E. Davies, one of the justices of this court, and a jury, and the said jury having rendered a verdict for the said plaintiff for two thousand and seventy-one dollars and twenty-five cents:

Now, on motion of Benjamin T. Kissam, plaintiff's attorney, it is adjudged that Stephen G. Wood, plaintiff, do recover of Robert Chew, defendant, the sum of two thousand and seventy-one dollars and twenty-five cents for principal and interest, and the sum of three hundred and eleven dollars and forty-five cents for his costs and disbursements, and nine dollars and thirty-six cents interest on verdict, amounting together to the sum of two thousand three hundred and ninety-two dollars and six cents.

All which we have caused by these presents to be exemplified, and the seal of our said supreme court to be hereunto affixed.

Witness William H. Leonard, justice, at the city of New York, the 17th day of May, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the ninety-first.

W'M C. CONNOR, *Clerk.*

I, W'm H. Leonard, presiding justice of the supreme court of the State of New York, for the city and county of New York, do hereby certify that William C. Connor, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York, and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification, is the seal of
136 our said supreme court, and that the attestation thereof is in due form.

W'M H. LEONARD, *P. J.*

Dated New York, May 17th, 1867.

STATE OF NEW YORK, *City and County of New York, ss :*

I, William C. Connor, clerk of the supreme court of said State, in and for the city and county of New York, do hereby certify that William H.

Leonard, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court, this 17th day of May, 1867.

[L. S.] W'M C. CONNOR, *Clerk.*

EXHIBIT B.

Against whom—Robert Chew.
In whose favor—Stephen G. Wood.
Where perfected—New York supreme.
When perfected—April 6th, 1859, 1 20 p. m.
Damages and costs—$2,392 06.
Attorney—Benj. T. Kissam.
When satisfied—April 11th, 1859.

COUNTY CLERK'S OFFICE, *City and County of New York, ss:*

I, John Clancy, clerk of the city and county of New York, certify that the above is a true and correct extract from the docket of transcripts kept in my office.

And I also certify that the above judgment is satisfied of record.

In testimony whereof I have hereunto subscribed my name, and affixed my official seal, this 22d day of September, 1859.

[L. S.] JOHN CLANCY, *Clerk.*

137 *Exhibits for appellee.*

EXHIBIT A.

Robert Chew and wife to Peter Walker—mortgage.

This indenture, made the thirteenth day of March, in the year one thousand eight hundred and fifty-one, between Robert Chew, of the city of New York, formerly, but at present of Alexandria, in the State of Louisiana, by his attorney, Louisa Chew, of the city of New York, as will more fully appear by a power of attorney hereto annexed, and Louisa, his wife, parties of the first part, and Peter Walker, of Middlesex County, State of New Jersey, party of the second part:

Whereas the said parties of the first part are justly indebted to the said party of the second part in the sum of three thousand five hundred dollars, lawful money of the United States of America, secured to be paid by his certain bond or obligation bearing even date with these presents, in the penal sum of seven thousand dollars, lawful money, as aforesaid, conditioned for the payment of the said first-mentioned sum of three thousand five hundred dollars, on or before the fifteenth day of March, one thousand eight hundred and fifty-six, with interest thereon at the rate of six per centum per annum, payable semi-annually, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear:

Now this indenture witnesseth, that the said parties of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to them in hand paid by the said

party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, release, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever,

all that certain farm plantation, situate in the township of North
138 Brunswick, county and State aforesaid, adjoining land of Farrand Jacobs and others, beginning at a stake in the middle of the New Washington and Cranberry road, about four and one-quarter or four and one-half miles from Washington, and running thence along land of Samuel Whitehead (1) north forty four degrees west, ten chains and eighty-seven links, to within three links of a chestnut tree; (2) along another line of the same, and of Farrand Jacobs, south sixty-five and a half degrees west, thirty-six chains and eighty-six links, to a road; thence along said road and a line of Daniel McGurnes (3) south twenty-four degrees east, twenty-five chains, (more or less;) thence along line of Benjamin Petty and John Dunham (4) north forty-five and a-half degrees east, thirteen chains and eighty links, to a stake; thence (5) north sixty-five and a-half degrees east, six chains and sixty links, to the New Washington and Cranberry road aforesaid; thence along the middle of said road (6) north forty degrees and a half east, twenty-three chains and thirty-four links, to the place of beginning, and containing seventy-two acres and sixty-seven hundredths of an acre, be the same more or less.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, and to the same, every part and parcel thereof, with the appurtenances.

To have and to hold the above-granted and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof, forever.

Provided always, and these presents are upon this express condition, that if the said parties of the first part, their heirs, executors, or administrators, shall well and truly pay unto the said party of the second part, his heirs, executors, administrators, or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that
139 then these presents, and the estate hereby granted, shall cease, determine, and be void; and the said Robert Chew, for himself, his heirs, executors, and administrators, doth covenant and agree to pay unto the said party of the second part, his executors, administrators, or assigns, the said sum of money, and interest, as mentioned above, and expressed in the condition of the said bond. And if default shall be made in the payment of the said sum of money above mentioned, or the interest that may grow due thereon, or of any part thereof, that then and from thenceforth, it shall be lawful for the said party of the second part, his executors, administrators, and assigns, to enter into and upon all and singular the premises hereby granted, or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said parties of the first part, their heirs, executors, administrators, or assigns therein, at public auction, according to the act in such case made and provided; and as the attorney of the said parties of the first

part, for that purpose by these presents duly authorized, constituted, and appointed, to make and deliver to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple, and out of the money arising from such sale to retain the principal and interest which shall then be due on the said bond or obligation, together with the cost and charges of advertisement and sale of the same premises, rendering the overplus of the purchase money (if any there shall be,) unto the said parties of the first part, their heirs, executors, administrators, or assigns; which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said parties of the first part, their heirs and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from, or under him, them, or either of them.

In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

[L. S.] ROBERT CHEW,
By his Attorney, Louisa Chew.

[L. S.] LOUISA CHEW.

Sealed and delivered in the presence of—
W. BERGASSE LABAU.

140 STATE OF NEW YORK, *City and County of New York, ss:*

Be it remembered that, on this thirteenth day of March, A. D. 1851, personally appeared before me one Robert Chew, by Louisa Chew, his attorney, and Louisa Chew, his wife, who, I am satisfied, are the grantors in the within deed of conveyance named, and I having first made known to them the contents thereof, the said Louisa Chew did acknowledge that she signed, sealed, and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed; and also as the act and deed of the said Robert Chew, as his attorney, for the uses and purposes therein expressed. And the said Louisa Chew, at a private examination, separate and apart from her said husband, further acknowledged that she signed, sealed, and delivered the same as and for her voluntary act and deed freely, without any fear, threats or compulsion, of and from her said husband.

All of which is certified by me.

W. BERGASSE LA BAU,
Commissioner of Deeds for the State of New Jersey, appointed by the Governor thereof.

Know all men by these presents, that I, Peter Walker, the within grantee, in consideration of the sum of eight hundred dollars, to me paid by Cornelius W. Tunison, of the county of Middlesex, New Jersey, the receipt whereof is hereby acknowledged, do assign, transfer, and set over unto the said Cornelius W. Tunison, his heirs and assigns, the *the* within mortgage, and the bond therein referred to, as collateral security for the payment of a certain note of hand for said sum of eight hundred dollars, given by me to the said Cornelius W. Tunison, being of even date herewith, and payable on the first day of May next, with interest from date.

In witness whereof I have hereunto set my hand and seal this 10th day of July, 1851.

PETER WALKER. [L. S.]

Signed, sealed, and delivered in the presence of—
N. BOORAEM.

Received November 17th, 1851, the above eight hundred dol-
141 lars in full, with interest to date, from Peter Walker, and for which I hereby relinquish all claim to this bond and mortgage, as collateral security, to Peter Walker, and transfer the same to him.

CORNELIUS W. TUNISON.

Witness present:
R. HENRY GOLDEN.

Received in Middlesex clerk's office, March 20th, 1851, and recorded in Book 19 of Mortgages, folio 329, by

N. BOORAEM.

EXHIBIT B.

Robert Chew to Louisa Chew—power of attorney.

Know all men by these presents, that I, Robert Chew, of the city of New York formerly, but at present of Alexandria, in the State of Louisiana, have made, constituted, and appointed, and by these presents, do make, constitute, and appoint my wife, Louisa Chew, of the city of New York, my true and lawful attorney, in my name, place, and stead, to sell, grant, and convey any and all lands, tenements, and real estate which I am now seized or possessed of, or which I may hereafter become seized or possessed of, wheresoever situated or located, whether in the State of New York or elsewhere, and in my name to sign, seal, acknowledge, and deliver all necessary deed or deeds, conveyance or conveyances, for granting and conveying, assuring, warranting, and defending the title to any such lands and tenements, or real estate, to the grantee thereof, his heirs, legal representatives, and assigns, and to make any such sales and conveyances, on such terms and conditions of pay as she shall deem proper, and to sign, seal, acknowledge, and deliver any release or discharge of any and all mortgage or mortgages, taken upon the sale of any such real estate, or any mortgage or mortgages which I now hold on any real estate in the State of New York, hereby giving and granting unto my said attorney full power and authority to do and
142 perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or her substitute or substitutes shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereunto set my hand and seal this nineteenth day of August, in the year of our Lord one thousand eight hundred and forty-eight.

R. CHEW. [L. S.]

In presence of—
ANDREW WARNER.

CITY AND COUNTY OF NEW YORK, *ss:*

On the twenty-eighth day of August, 1848, before me personally came Robert Chew, proven to me satisfactorily to be the same person described in and who executed the foregoing instrument, by the oath of Andrew Warner, subscribing witness thereto, who, being by me duly sworn, did depose and say that he resides in the city of New York; that he is acquainted with Robert Chew, then present, and that he knew him to be the same person described in and who executed the within

instrument. He, the said Robert Chew, acknowledged before me that he executed the same for the uses and purposes therein mentioned.

JAMES T. BOYD,
Commissioner of Deeds.

STATE OF NEW YORK, *City and County of New York, ss:*

I, James Conner, clerk of the city and county of New York, do hereby certify that James T. Boyd, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a commissioner of deeds for said city and county, dwelling in the said city, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such commissioner, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

143 In testimony whereof I have hereunto set my hand and affixed the seal of the said county, the twenty-eighth day of August, 1848.

[L. S.] JAMES CONNER, *Clerk.*

STATE OF NEW YORK, *City and County of New York, ss:*

Be it remembered that, on this 13th day of March, A. D. 1851, personally appeared before me one Andrew Warner, to me known to be the subscribing witness to the execution of the within deed, who, being by me duly sworn, did depose and say that he knew Robert Chew, whom he saw execute the within power of attorney, to be the same individual described in and who executed the same, and acknowledged that he signed, sealed, and delivered the same, as his voluntary act and deed, for the uses and purposes therein expressed, the contents thereof being by him first made known to him; and that, at his request, he became a subscribing witness thereto.

All of which is certified by me.

W. BERGASSE LABAU,
Commissioner of Deeds for the State of New Jersey, appointed by the Governor thereof.

ERIE COUNTY, *Clerk's Office, ss:*

Recorded in liber 106, page 2, deeds, January 19th, 1849, 10½ o'clock, a. m.

W. BRISTOL, *Clerk.*

Received in Middlesex clerk's office, March 20th, 1851. Recorded in book 19 of mortgages, page 328, by

N. BOORAEM, *Clerk.*

EXHIBIT C.

Robert Chew to Peter Walker—bond.

Know all men by these presents, that I, Robert Chew, of the city of New York formerly, but at present of Alexandria, in the State of Louisiana, by my attorney, Louisa Chew, of the city of New York, am held and

144 firmly bound unto Peter Walker, of Middlesex County, State of New Jersey, in the sum of seven thousand dollars, lawful money of the United States of America, to be paid to the said Peter Walker, his heirs, executors, administrators, or assigns; for which payment well and

truly to be made, I bind myself, my heirs, executors, and administrators, and every of them, firmly by these presents, sealed with my seal, dated the thirteenth day of March, one thousand eight hundred and fifty-one.

The condition of the above obligation is such that if the above-bounden Robert Chew, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid unto the above-named Peter Walker, his heirs, executors, administrators, or assigns, the just and full sum of three thousand five hundred dollars, lawful money of the United States of America, on or before the fifteenth day of March, eighteen hundred and fifty-six, with interest thereon at the rate of six per cent. per annum, payable semi-annually, as will more fully appear by a mortgage bearing even date with these presents, given by the said parties of the first part to the said parties of the second part, then the above obligation to be void; otherwise to remain in full force and virtue.

[L. S.] ROBERT CHEW,
By his Attorney, Louisa Chew.

Sealed and delivered in the presence of—
M. K. BURKE.

EXHIBIT D.

Know all men by these presents, that I, Peter Walker, the grantee mentioned in the indenture of mortgage hereunto annexed, in consideration of the sum of one thousand seven hundred dollars, to me paid by Stephen G. Wood, of the county of Middlesex, in the State of New Jersey, the receipt whereof is hereby acknowledged, do hereby assign, transfer, and set over unto the said Stephen G. Wood, his heirs, and assigns, the mortgage hereto annexed, and the bond therein
145 referred to, as collateral security for the payment of the said sum of one thousand seven hundred dollars, with the interest thereon, on or before the eighteenth day of November, in the year eighteen hundred and fifty-two; said sum of money being the amount of a certain promissory note, given by me to said Wood, bearing even date with these presents, payable to said Stephen G. Wood, or order, in one year from the date thereof, with interest till paid.

In witness whereof I have hereto set my hand and seal this eighteenth day of November, 1851.

PETER WALKER. [L. S.]

Sealed and delivered in the presence of—
JAMES R. MEGEE.

New York, February 16th, 1852, received from Stephen G. Wood, the assignee and holder of the annexed bond and mortgage, the sum of two hundred dollars, which sum is to be paid to him, with interest, on the eighteenth of November next, and the annexed bond and mortgage are to be held as collateral security to the payment of said sum, in addition to the seventeen hundred dollars above mentioned.

PETER WALKER.

In the presence of—
JAMES R. MEGEE.

STATE OF NEW YORK, *City and County of New York, ss:*

On this twenty-sixth day of March, 1852, before me, Richard Goodman, commissioner to take the acknowledgment and proof of deeds for New Jersey, personally appeared James R. Megee, who I am satisfied

is the subscribing witness to the within deed, and he being by me duly sworn, says that he resides at South Amboy, in the State of New Jersey; that he saw Peter Walker sign, seal, and deliver the same, as his voluntary act and deed; that deponent, at the same time, subscribed his name as a witness; that said Walker resides in the city of New York, and is the grantor mentioned and described in said deed.

RICHARD GOODMAN,
Commissioner for New Jersey.

146 STATE OF NEW YORK, *City and County of New York, ss:*

On the nineteenth day of October, eighteen hundred and fifty-four, before me, personally appeared James R. Megee, known to me, who being by me duly sworn, did depose and say, that he resides in the State of New Jersey; that he is acquainted with Peter Walker, and knows him to be the same person described in and who executed the foregoing instrument; that he was present and saw him sign and execute the same, and that he thereupon acknowledged to him that he executed the same, for the use and purpose therein mentioned. Whereupon he subscribed his name as a witness thereto.

W'M M. RANDELL,
Commissioner of Deeds.

Received in Middlesex clerk's office March 20th, 1851, and registered in book 19 of mortgages, fol. 329.

EXHIBIT E.

Stephen G. Wood to Martin F. Braisted—assignment of mortgage.

Know all men by these presents, that I, Stephen G. Wood, of the first part, in consideration of the sum of twenty-five hundred dollars, lawful money of the United States, to me in hand paid by Martin F. Braisted, of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred, and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over, unto the said party of the second part, a certain indenture of mortgage, bearing date the thirteenth day of March, in the year one thousand eight hundred and fifty-one, made by Robert Chew, of the city of New York, and Louisa Chew, his wife, to Peter Walker, of Middlesex County, State of New Jersey; together with the bond of obligation therein de-
147 scribed, and the money due and to grow due thereon, with the interest: To have and to hold the same, unto the said party of the second part, his executors, administrators, and assigns, forever, subject only to the proviso in the said indenture of mortgage mentioned; and I do hereby make, constitute, and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name or otherwise, but at his proper costs and charges, to have, use, and take, all lawful ways and means of the recovery of the said money and interest, and in case of payment, to discharge the same fully as I might or could do if these presents were not made.

In witness whereof I have hereunto set my hand and seal, the tenth day of December, in the year one thousand eight hundred and fifty-seven.

STEPHEN G. WOOD.

Sealed and delivered in the presence of—
BENJ. T. KISSAM.

CITY AND COUNTY OF NEW YORK, *ss:*

On the twenty-third day of August, A. D. 1866, before me, came Stephen G. Wood, known to me to be the individual described in and who executed the within instrument, and acknowledged he executed the same.

EDWIN F. COREY,
Commissioner of Deeds.

UNITED STATES OF AMERICA,
State of New York, City and County of New York, ss:

Be it remembered that, on this twenty-third day of August, in the year one thousand eight hundred and sixty-six, before me, the undersigned, Edwin F. Cory, a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the State of New Jersey, to take the acknowledgment of deeds, &c., to be used or recorded therein, personally appeared Stephen G. Wood, who I am satisfied is the grantor in the annexed instrument named, and who executed the same, and I having first made know to him the contents thereof, he did thereupon acknowledge
148 that he signed, sealed, and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal, the day year aforesaid.

[L. S.]

EDWIN F. COREY,
Commissioner for the State of New Jersey,
Office 63 Wall Street, New York.

EXHIBIT F.

Catharine Walker, administratrix of Peter Walker, deceased, and Martin F. Braisted to Richard J. Brumagen—dated April 9th, 1859—assignment.

Know all men by these presents, that we, Catharine Walker, administratrix of the goods, chattels, and effects of Peter Walker, deceased, and Martin F. Braisted, of the first part, in consideration of the sum of one dollar, lawful money of the United States, to us in hand paid, (and other good and valuable considerations,) by Richard J. Brumagen, of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred, and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over, unto the said party of the second part, a certain indenture of mortgage, bearing date the thirteenth day of March, in the year one thousand eight hundred and fifty-one, made by Robert Chew, of the city of New York, and Louisa Chew, his wife, to Peter Walker. together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest; to have and to hold the same, unto the said party of the second part, his successors and assigns, for the benefit of the said Martin F. Braisted, Jacob Van Cleef's estate, and other persons having just claims against the said Peter Walker, deceased, subject only to the proviso in the said indenture of mortgage mentioned; and we do hereby make, constitute, and appoint, the said party of the second part our true and lawful attorney, irrevocable, in our name or otherwise, but at his proper costs and charges, to have, use, and take all lawful
149 ways and means for the recovery of the said money and interest;

and in case of payment, to discharge the same as fully as we might or could do if these presents were not made.

In witness whereof we have hereunto set our hands and seals the ninth day of April, in the year one thousand eight hundred and fifty-nine.

[L. S.] CATHARINE her + mark WALKER,
Administratrix of P. Walker, deceased.

[L. S.] M. F. BRAISTED.

Sealed and delivered in the presence of—
C. M. MARSH.

CITY AND COUNTY OF NEW YORK, *ss:*

On this twenty-third day of August, A. D. 1866, before me, come Martin F. Braisted, known to me to be the individual described in and who executed the within instrument, and acknowledged he executed the same.

EDWIN F. COREY,
Commissioner of Deeds.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this twenty-fifth day of September, A. D. 1866, before me, the undersigned, Charles Nettleton, a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the State of New Jersey, to take the acknowledgment of deeds, &c., to be used or recorded therein, personally appeared C. M. Marsh, of full age, who, being duly sworn according to law, on his oath deposes and says that he saw Catharine Walker, assignor named in the within assignment, sign, (by mark,) seal, and deliver the same, and at the same time heard the said Catharine Walker acknowledge that she signed, (by mark,) sealed, and delivered the same as her voluntary act and deed, and that he, the said C. M. Marsh, subscribed his name thereto as an attesting witness.

In witness whereof I have hereunto set my hand, and affixed my official seal, this twenty-fifth day of September, A. D. 1866.

[L. S.] CHARLES NETTLETON,
Commissioner for New Jersey in New York.

150 UNITED STATES OF AMERICA,
State of New York, City and County of New York, ss:

Be it remembered that, on this twenty-third day of August, in the year one thousand eight hundred and sixty-six, before me, the undersigned, Edwin F. Corey, a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the State of New Jersey, to take the acknowledgment of deeds, &c., to be used or recorded therein, personally appeared Martin F. Braisted, who, I am satisfied, is the grantor in the annexed instrument named, and who executed the same, and I having first made known to him the contents thereof, he did thereupon acknowledge that he signed, sealed, and delivered the seme as his voluntary act and deed, for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

EDWIN F. COREY,
Commissioner for the State of New Jersey,
Office 63 Wall Street, New York.

151 Court of errors & appeals, March term, 1870.

RICHARD J. BRUMAGIN, COMPL'T,
and
LOUISA A. CHEW, DEF'D'T. } Syllabus.

1. A judgment recovered in the State of New York must receive here the same effect to which it is entitled there.

2. Under section 111 of the New York code a person who assigns a bond as collateral security is a necessary party to a suit brought by his assignee against the obligor of the bond.

152 3. On foreclosure here of the mortgage given to secure the bond the complainant who holds it absolutely by assignment, subsequent to such collateral assignment, is entitled to a decree for the amount due upon it in excess of the judgment in New York.

153 Court of errors & appeals, March term, 1870.

LOUISA CHEW, APPELLANT,
and
RICHARD J. BRUMAGEN, RESPONDENT. } On appeal.

Argued at March term, 1870, by Mr. A. V. Schenck and Mr. E. P. Cowles for appellant, Mr. E. T. Green and Mr. Williamson for respondent.

The opinion of the chancellor is reported in 4 C. E. Green, 130.

VANSYCKEL, J.:

The facts of this case are concisely stated in the learned chancellor's opinion as follows: "Robert Chew, in 1851, gave to Peter Walker
154 his bond, secured by mortgage on lands in this State for the payment of thirty-five hundred dollars, in March, 1856, with interest half yearly. Walker, in December, 1851, assigned the bond and mortgage to Stephen G. Wood, as collateral security for the payment of seventeen hundred dollars, and afterwards further assigned them as collateral security for the sum of two hundred dollars. In April, 1853, Wood brought suit on the bond against Chew in the supreme court of New York, joining Walker as defendant, he having refused to join as plaintiff. Chew appeared and pleaded; Walker was not served with process, nor did he appear or plead; a rule was ordered after his death, which occurred during the suit, making his administratrix in New York a party in his place, but she was not served with the rule or with process, and did not appear or plead, nor was she in any way brought into court.
155 Chew pleaded fraud in the consideration of the bond, and claimed to recoup the damages and loss to him arising from the fraud, which consisted in false representations as to property sold to him, for which the bond was given as payment.

"An issue was joined between Wood and Chew on this question of fraud, and upon a trial had on this issue the jury found for Wood the sum of two thousand and ninety-one dollars and twenty-five cents, for which judgment was given, which Chew immediately paid. In this issue and trial the administratrix of Walker took no part.

"Pending the suit, in December, 1857, Wood assigned the bond and mortgage to M. F. Braisted, and on the ninth of April, 1859, three days after the judgment in the supreme court, and two days after the pay-

ment of it, Braisted and Walker's administratrix assigned the
156 bond and mortgage to Brumagen, the complainant."

Brumagen filed his bill in this State to foreclose the said mortgage, and the defendant insists that the judgment in New York extinguished the bond, and that by the payment of that judgment the debt secured by the mortgage was satisfied, and the mortgage thereby discharged.

The question turns upon the effect of that judgment in New York, it being admitted that it is entitled to the same effect here that is given to it by the laws of that State.

Two questions are raised in the discussion of this case:

1. Whether Walker was a necessary party to the suit instituted by Wood in New York?

2. If necessary, was he an actual party to that suit?

157 The first question involves the construction of section 111 of the New York code, which is in these words:

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113."

Section 113 provides that an executor, administrator, or trustee of an express trust, or a person expressly authorized by statute may sue without joining the person for whose benefit the suit is prosecuted.

Who are the real parties in interest within the meaning of section 111?

If Walker was a necessary party to the suit in New York, it is conceded that the judgment in that case cannot, unless he was an actual party, bind him or those claiming under him.

Wood was interested in the bond to the extent of his loan to Walker, and Walker owned the residue.

158 The words of the code in their ordinary acceptation would clearly include both parties, and Walker is interested to a greater extent than Wood, for his liability to Wood remains, whether the collateral can be enforced or not, while Wood looks to the bond only in the event of Walker's default.

Was the code intended simply to effect a change in the rule of the common law, that a chose in action was not assignable so as to enable the assignee to sue thereon in his own name?

Was it designed merely to make the assignment in the words of our own statute good and effectual in law, and to clothe the legal title with the right to sue?

If this purpose existed, it would have been fully effectuated
159 without the exception in section 113. If the absolute legal title without the beneficial interest can sustain the action, the exception in section 113 in favor of executors and trustees, was wholy unnecessary, and section 111 would have precisely the same import with the exception expunged. Executors have the legal title, but not the beneficial interest, and the framers of the code must have understood that by the term "real party in interest," they excluded those who had the legal, but not the beneficial interest. It would be clearly in violation of a well-settled rule of statutory construction to take out of the operation of this section persons who are not of the class expressly excepted by its terms, or to adopt a rule which gives to the exception no purpose whatever.

A reference to other provisions of the code in connection with
160 section 111, establishing a procedure before unknown to courts of common law, will show a marked intention in its framers to assimilate the practice in courts of law, with respect to parties, to that which had pertained in equity.

Section 117 enacts that all persons having an interest in the subject-matter of the action, may be joined as plaintiffs, with certain exceptions.

Section 118, that any person may be a defendant who has, or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the questions involved therein.

Section 119, that those united in interest must be joined as plaintiffs, or defendants, unless a party refuse to join as plaintiff, and then
161 he is to be made defendant.

Section 122, that the court may determine any controversy between the parties before it, when it can be done without predjudice to the rights of others, or saving their rights, but when that cannot be done the court shall order them brought in.

And section 144, that the defendant may demur for defect of parties.

It will be observed that these rules apply as well to cases on the equity, as the law side of the court. The term "real party in interest" was well understood in equity to mean the beneficial interest, the party entitled to the fruits when gathered.

The commissioners of the code, in reporting these provisions
162 which were afterwards adopted, say (title 3, p. 123,) that the purpose they had in view was:

First. To do away with the artificial distinctions existing in courts of law, and to require the real party in interest to appear in court as such.

Second. To require the presence of such parties as are necessary to make an end of the controversy.

If the view now taken prevails, they have accomplished their purpose; otherwise not.

Giving the words "the real party in interest" the signification they had in equity, concludes this controversy.

163 It is the undoubted rule in New York, that upon foreclosure of a mortgage, the assignor who has assigned as collateral security, is a necessary party, even though the assignment is absolute in its terms, and expresses payment of a full consideration. (Whitney v. McKinney, 7 Johns. Chy., 145; Kettle v. Van Dyke, 1 Sanford, 76.)

Therefore the interpretation now given to section 111 must be the true one, unless the code was designed to effect a radical change in the rule in equity, an intention nowhere intimated, either in the code itself, in the history of its adoption, or in any subsequent adjudication.

The New York cases show that in actions at law, ex contracte,
164 under the code, a distinction has been drawn between proper parties and necessary parties, in cases where at common law such distinction was never known; and this departure from the common law can be entertained only because it is understood that the rule in equity as to parties, has been engrafted upon its procedure.

Section 111 is imperative in its provisions, bringing within its operation all who are comprehended in the description, "real party in interest," excepting those expressly excluded by section 113. Therefore the institution of the suit by one of several parties in interest will not satisfy its requirement; all must be joined.

165 This section declares who shall prosecute an action, and who shall be plaintiff is made to depend, not upon the nature of the defence which may be set up, but upon the character of the interest which the plaintiff has.

The code allows defences, either legal or equitable, to be set up in a

suit at law, in all cases; and thus every defence is made a legal defence, a defence that will prevail in a suit at law.

The fact whether Walker was really interested in the bond, or the extent of his interest, must be determined by the contract he made with Wood, not by the circumstance that the obligee may chose to allege fraud in the consideration of his bond, which was not an
166 admissable defence before the code to an action at law on a sealed instrument.

This view, however clear it may be to my own mind, must be yielded if it is in conflict with the adjudicated cases in New York; whatever construction the courts have adopted there should conclude us here.

In Lewando vs. Dunham, 1 Hilton, 114, the plaintiff had an absolute assignment of the claim under seal. It appeared in evidence that the assignor was entitled to half the amount to be recovered; the court held that suit would not lie by the assignee alone, thus clearly holding that the absolute legal title, coupled with a partial interest, will not sustain a suit.

167 In Cummings vs. Morris, 25 New York, 625, the notes sued upon were passed to the plaintiff under an agreement to give the assignor, when notes were collected, the amount thereof in stock of the Evergreen Cemetery Company.

The court properly held that the assignee could sue alone; the assignor had no interest whatever in the proceeds of the notes when collected, he had simply a claim against the assignee for the stock agreed to be furnished. In this case, as previously reported in 3 Bosworth, 572, the court say that a party who has an absolute right to the money to appropriate it to his own use, when recovered, is the real party in interest, under section 111, and that in this case the plaintiff had the
168 legal and equitable title.

It is evident, from the language used by the court, that if the assignor had been entitled to any part of the money when collected, he would have been held to be a necessary party.

Considerant v. Brisbane, 22 New York, 389, is a leading case on this subject. The suit was brought by Considerant upon a promissory note drawn by Brisbane, payable to Considerant as executial agent of the company, Bureau, Guillon, Godin & Co.

Judge Wright, in delivering the opinion of the court, held that, although prior to the code, Considerant could alone have main-
169 tained the action, because he had the absolute legal title; yet, under section 111, he was not the real party in interest, the beneficial interest being the sole test of the right to sue. But in this case the plaintiff's right to sue was sustained, upon the ground that he was trustee of an express trust.

In this opinion, Justice Selden, Davies, Clerke, and Welles concurred.

Judge Denis, in a dissenting opinion, concurred in by Ch. Justice Comstock and Judge Bacon, says that the code, though adopting as a general rule the practice prevailing in courts of equity, by which the parties having the beneficial interests were required to be brought before the court, made an exception in favor of trustees of express
170 trusts, and dissents from the majority opinion only in holding that the principals named in the note must be regarded as the promisees, and the suit must be in their name.

In this case, decided in 1860, the eight judges of the court of appeals united in holding that the code had adopted the practice prevailing in equity, by which the parties having the beneficial interest must be

before the court, and that the beneficial, not the legal interest, was the sole test of the right to sue.

In the Western Bank vs. Sherwood, 29 Barbour, 389, the suit
171 was by the assignee to whom the bond had been assigned as collateral security to which the defence set up was want of consideration. Judge Warren, in his opinion, says that when a complete determination of the controversy cannot be had without the presence of other parties, they must be brought in; and that the judgment rendered in the court below would not determine the controversy between the defendant and Johnson, the plaintiff's assignor, who was not a party.

Boynton v. The Clinton and Essex Mutual Ins. Company, 16 Barb., was a suit by assignor & assignee as plaintiffs on a policy of insurance assigned as collateral. The court held that, although by the
172 terms of the policy nothing could be recovered on it in excess of the amount due from assignor to assignee, the assignor was properly joined with him as plaintiff in the suit, because he was a party in interest, as payment of the loss to that extent would discharge his debt to the assignee.

Secor vs. Keller, 4 Duer, 416, is equally in point, where it was held that a dormant partner in a suit by his co-partners, was a necessary party under section 111. The court uses this unmistakable language:

"Before the code, in an action at law, a dormant partner was not a necessary party, but in equity every partner, active or dormant, having an interest in the controversy, was a necessary party, and we
173 agree with the referee that the code has adopted the rule which prevailed in equity, and made it universal. The provision of section 111 is imperative and subject to no exception other than those stated in section 113."

It will be found upon a critical examination of the cases in which a suit has been maintained by one not having the entire beneficial interest that he has been treated as trustee of an express trust.

The case of St John vs. The American Life Insurance Company was mainly relied upon by defendant's counsel. The plaintiff sued upon two policies of insurance which had been assigned to him under an
174 agreement that if policy number 2500 should be paid to him, he would pay $1,500 of the proceeds to the assignor's wife, and pay to her all he recovered on the other policy. The point was made that the assignor was a necessary party. The court of appeals held otherwise, without stating the ground upon which they vested their decision.

There was no doubt about the right of the plaintiff to sustain his action. He was a trustee of an express trust.

So in the case of Nelson vs. Easton, 26 N. Y., 416. The plaintiff was held to be the trustee of an express trust.

Grant vs. Talman et al., 20 N. Y., 191, was an action to foreclose
175 a mortgage by the party to whom it was assigned as collateral.

The court say that the assignee was the legal owner of the securities, and the proper party to sue, and that the action might be continued in his name, even though the assignor had paid the debt for which he held the mortgage as security.

It does not clearly appear, but it would seem, from the names of the parties at the head of the case "Grant vs. Talman et al.," and the statement in the case, that the defendants Talman & wife alone resisted the foreclosure; that the assignor was a party to the suit; and, if that was so, all parties in interest were before the court.

176 These cases are in full accord with what I understand to be the correct interpretation of the code, and therefore Walker was a

necessary party to the suit on the bond, unless, by virtue of the assignment to him, he became the trustee of an express trust. By the assignment, Wood did not become a trustee for Walker. Walker's right was strictly an equity, a right to redeem by paying his debt. If Wood had collected an amount in excess of his claim, a trust would have resulted; but until that contingency happened, he was in no sense a trustee of an express trust for Walker. In reaching this conclusion, the amendment to section 113, in 1851, has not been overlooked.

177 Walker having been a necessary party, the record produced must answer whether he was an actual party.

In New York, a person who is not served with process, or does not appear, unless he is a joint contractor with the party served or appearing, is not deemed a party to the suit, and cannot be affected by the judgment, although he is named as a party in the summons or process. (New York Code, § 136; Robinson vs. Frost, 14 Barb., 536; Howard vs. Finch, 5 Duer, 666; Norton v. Hayes, 4 Dennis, 245; East River Bank v. Cutting, 1 Bosw., 536.)

178 The complaint does not aver, nor does the record in any way show, as the code requires that it should, that Walker was either summoned or voluntarily in court.

A record made up according to the course of proceeding at common law sets out the declaration, which avers that the defendant is in custody, or that he was summoned or attached to answer, or present in court in his own proper person; and in such case the record would be prima facie, if not conclusive, against the defendant, in the absence of any statutory provision. (Price v. Ward, 1 Dutcher, 225.)

179 The judgment in New York therefore has not the virtue which is claimed for it, and the defendant is without defence, except as to the amount which was paid to Wood upon the bond.

The code clearly defines the mode of proceeding in a case like the one under consideration. If Walker refused to join in the suit as plaintiff, that fact, being stated in the complaint, authorized Wood to make him a defendant.

180 Wood having failed to bring Walker in, Chew, under section 144 of the code, should have demurred for want of proper parties, and thus have secured an adjudication that would have fully protected him. The further prosecution to which Chew is subjected, results from his own neglect.

The decree of the chancellor must be affirmed.

181 STATE OF NEW JERSEY:

I, Henry C. Kelsey, secretary of state of the State of New Jersey, and "ex-officio" clerk of the court of errors and appeals in the last resort in all causes, do hereby certify the foregoing to be a true copy of the opinion of the court in the above-stated cause, as taken from and compared with the original now remaining on file in my office.

In testimony whereof I have hereunto set my hand and affixed my official seal this 18th day of August, A. D. 1870.

[SEAL.] HENRY C. KELSEY.

Opinion of the chancellor.

Robert Chew, in 1851, gave to Peter Walker his bond, secured by mortgage on lands in this State, for the payment of thirty-five hundred dollars, in March, 1856, with interest half yearly. Walker, in December, 1851, assigned the bond and mortgage to Stephen G. Wood, as col-

lateral security for the payment of seventeen hundred dollars, and afterwards further assigned them as collateral security for the sum of two hundred dollars.

In April, 1853, Wood brought suit on the bond against Chew, in the supreme court of New York, joining Walker as defendant, he having refused to join as plaintiff; Chew appeared and pleaded; Walker was not served with process, nor did he appear or plead. A rule was ordered after his death, which occurred during the suit, making his administratrix in New York a party in his place, but she was not served with the rule or with process and did not appear or plead, nor was she in any way brought into court. Chew pleaded fraud in the consideration of the bond, and claimed to recoup the damages and loss to him arising from the fraud, which consisted in false representations as to property sold to him for which the bond was given as payment. An issue was joined between Wood and Chew, on this fraud, and upon a trial had on this issue the jury found for Wood the sum of two thousand and ninety-one dollars and twenty-five cents, for which judgment was given, which Chew immediately paid. In this issue and trial the administratrix of Walker took no part.

Pending the suit in December, 1857, Wood assigned the bond and mortgage to M. F. Braisted, and on the ninth of April, 1859, three days after the judgment in the supreme court, and two days after the payment of it, Braisted and Walker's administratrix assigned the bond and mortgage to Brumagen, the complainant.

The defendant contends that the suit upon the bond in New York, and the verdict and judgment therein, extinguished the bond, and that by the payment of that judgment, the bond and the debt which the mortgage was given to secure was satisfied, and the mortgage, which has no existence except as security for the debt, was thereby also satisfied.

The position taken for the defendant, that the judgment in New York must have the same effect here as it would have in New York, by the laws of that State, is correct. And the question to be determined is, the effect of it in New York. In that State, a person made party to a suit in the summons or process, who is not served or does not appear,
unless he be a joint contractor with a party summoned or appear-
182 ing, is not deemed a party to the suit, and cannot be affected by
the judgment. The suit proceeds against the party summoned as if he was the sole defendant. (New York Code, § 136; Robinson v. Frost, 14 Barb., 5, 6; Norton v. Hayes, 4 Den., 245; East River Bank v. Cutting, 1 Bosw., 636.)

By the New York Code, sections 111 and 112, suits upon things in action must be brought in the name of the real party in interest. Wood was only interested in the bond to the extent of his advance, for which they were assigned as collateral security. Walker owned the residue. If he had been made a party, all the questions could have been settled in that suit. (Code, sections 263 and 274.)

Chew did not make any objections, so far as appears by the record, to the suit proceeding without him, and in such case this suit, being between Wood and Chew, both upon the well-established principles of law in such case, and by the law of the State of New York, could only affect the parties to the suit. It would be strange if one holding a bond as collateral security for half its amount could bring suit upon it in the absence and without the knowledge of the pledgor, and by negligence or collusion, permit a defence to one-half the amount to prevail, on recovering the amount necessary to pay his own claim.

If the assignment had been absolute, and the obligor had not known that it was intended as collateral, the case would be different; but here the complaint in the suit in New York sets forth that it was collateral, and that Walker had an interest, and ought to be a party. And for ought that appears, the jury may have found their verdict for the amount due to Wood on his loan to Walker, without considering or determining upon the validity of the defence beyond that amount. By the code he was not entitled to recover more.

Beyond the amount recovered by Wood, and paid to him, this judgment in New York is no defence to this bond or mortgage; the trial and judgment was between strangers, and cannot affect Walker's administratrix, or any one holding by assignment from her.

The complainant is entitled to a decree for the amount secured by the mortgage, above the amount paid to Wood.

183 (Indorsed:) Certified copy of c't appeals, March term, 1870. Chew, app'l't, and Brumagen, resp'd't. Opinion. Vansyckel, J.

(Indorsement on cover:) No. 316. Louisa Chew, plaintiff in error, vs. Richard J. Brumagen. New Jersey court of chancery.
Filed 29th November, 1870.

Bemphirk, 5 Halst., (N. J.), 110; Davis vs. Austin, 1 Vesey, p. 247, 5 Selden (N. Y.) 211 id., 483).

THIRD. The courts below held that the judgment in New York, between Wood and Chew was inconclusive. because neither Peter Walker, or his legal representative was in fact a party, and that under the law of New York in order to conclude the rights of Walker or his estate by the judgment, he or his representative should have been brought in as a party. This we submit was error.

(1). Prior to the adoption of the constitution of 1846, the state of New York had a Supreme Court, having general jurisdiction in all actions at common law and a Court of Chancery having sole jurisdiction of all matters in equity.

Each court had its separate mode of practice and pleading.

In actions at common law, the party plaintiff, except when specially otherwise authorized by statute, must be the *original party* to the contract, and for this reason often a nominal party only, the ancient rule in that respect being preserved.

In the Court of Chancery, it was indispensable that the *real party in interest*, that is to say, the assignee or equitable holder of the right, if the original party had parted with it, should be the party complainant or defendant, as the case might be.

By the constitution of 1846, New York abolished her Court of Chancery, and vested general jurisdiction, both at law and in equity, in one Supreme Court. (N. Y. Constitution, 1846, Art. 6, § 3).

The rules of practice which had prevailed in the two former courts were still continued in the newly erected court, that is to say, the old forms of action in cases at law, including the rule as to parties prevailing in actions at law, and the old Chancery forms and rules being preserved in cases in equity.

(2). To assimilate the forms and simplify the practice, the *Code of Procedure* was enacted in 1848.

The attention of the Commissioners who, under Legislative sanction, drew and presented that Code to the Legislature, was specially directed to the then prevailing and conflicting rules, as regards the necessary parties to actions. (Report of the Commissioners of New York Code, page 122–3; vide also, Field vs. Maybee, 5 Paige, 539; Rogers vs. Traders' Ins. Co., 6 Paige, 598; Mills vs. Hoag, 7 id., 21.

The Commissioners pointed out the uselessness of the distinction, and suggested and reported § 91 of the Code (now § 111), for the express purpose of making the *rule in equity* as to the party in whose name the suit should be brought *the rule in all classes of actions.*

The expression "*Real party in interest,*" as used in § 91, as so reported, had long been well known and understood in Equity Courts, both in England and America, and it meant and intended the party in whom the entire title, whether legal or equitable, was vested, as contradistinguished from a nominal party.

Prior to the Code, had a bond and mortgage been assigned, the suit must have still been in the name of the original obligee, if brought *at law* upon the bond, but in the name of the assignee if brought *in Equity* to foreclose the mortgage.

The object and sole object of § 91 (as first reported and adopted—now

§ 111) was to establish one uniform rule in all cases, and the rule which prevailed in equity was accordingly adopted. And that there might be no misunderstanding of its intent and meaning, the phrase *real party in interest*, so well understood in Equity previously, was the one used by the codifiers, both in the text and in their explanatory notes, and by the Legislature in the act.

But it should be observed that even before the abrogation by New York of he old practice in courts of law, in this respect, the common law rule as stotuits at law by assignees, had been to some extent modified by statute. (New York Sess. Laws, 1835, chap. 197; or 2 Rev. St., 2d ed., page 274, §5). Which provides that in certain cases suits at law might be brought by the *assignee of the bond.*

New Jersey has long had the same rule, adopted as early as 1797, that the assignee of the bond may sue in his own name.

(3). It may be allowed here to ask, and with some confidence, whether either in any court of Equity in New York or in England, where a suit has been brought to enforce payment of a bond or foreclose an accompanying mortgage in the name of the *assignee*, there has been held to be a defect of parties, because the *assignee* held the security under his assignment, as a "*collateral*," and the assignee was not brought in. No such case, we submit, can be cited.

It is submitted, too, that New Jersey, under her law of 1797, has never questioned the validity of a judgment recovered by such an assignee or the binding effect of the judgment upon the assignor.

New York has never under the act of 1835, above quoted challenged the binding effect of such a judgment upon the assignor, or his personal representatives.

The fundamental rule at common law has always been that a judgment is binding upon—not alone the actual parties to the record—but upon all who stand as privies, or under representation to the actual parties to the record.

Whatever remaining interest Walker might have in the bond or in the proceeds of the bond, Wood, his assignee, as between Walker and Chew represented in that suit, and Walker or his administratrix in the judgment of Wood *vs.* Chew stood bound by it, as privies by representation, that is, provided there can be any such thing as *privity* in its true meaning where the assignor has divested himself of all legal estate in *the thing*.

The phrase, then, "Real party in interest," has in § 111 the same, and it has no more extended meaning that it had *in equity* before the Code was adopted as used in Courts of Equity.

(4). The rule, as above claimed, ls that recognized and followed by the courts of New York, viz:

1. That Wood, as assignee, in the courts of New York, could maintain suit on the bond in his sole name, as plaintiff, without joining Walker or his administratrix, as a party, either plaintiff or defendant.

2. That both by General Law, and by § 112, of the N. Y. Code Chew could set up in that suit, whatever defence he had against Walker, and that the judgment in that suit concluded Walker, his personal representatives, and assigns.

In 1 E. D. Smith, Rep. (Hasting *vs.* McKinley), 272, 277. It is said "whether the title be legal or equitable, if he, (plaintiff) have the whole title, he may sue." (See also Sheldon *vs.* Wood, 2 Bosw., 272).

In Boynton vs. Clinton and Essex Mut. Ins. Co., 16 Barb., 254, the assignees (as *collateral*) of an insurance policy, in suing on the policy, joined

the assignor as a co-plaintiff. The objection was raised of a *misjoinder of parties.* Mr. Justice Hand did not doubt that the assignor was an *unnecessary* party. He concluded that he "*may* be a co-plaintiff under our system" that is, though *unnecessary*, yet he *might* be joined. It was not fatal if he was. (St. John vs. the Am. Mut. Ins. Co., 13 N. Y., 31).

In that case the assignee of two life policies sued to recover the moneys under an assignment, coupled with a further agreement that he was to pay all the insurance moneys in each policy ($4,000), over and above $500 to the wife of the insured.

The express point was raised, that the wife having an interest, was a *necessary* party as certainly she was if Walker or his administratrix, in Wood vs. Chew was. (Vide Mr. Kernan's Points, page 36).

This point was overruled. (See also Cummings vs. Morris, 25, N. Y,, 625; Poor vs. Guilford, 10 N. Y., 273; Grant vs. Talman, 20 N. Y., 191; Nelson vs. Eaton, 26 N. Y., 410; Voorhies vs. Child, 17 N. Y).

5. A distinction is to be observed between cases where the entire title is conveyed, and those cases were only a fractional interest in *the thing* is conveyed. In that class of cases where the assignee holds but one-third, one-half or some frational interest in the bond he never could at law or in equity and cannot now recover a judgment for his fractional interest without bringing in the other parties, either as co-plaintiffs or defendants. Since he does not represent the entire but a fractional portion of the subject matter of the suit, and the splitting up of demands is not permitted.

(6). There are also cases in which one not *necessarily* a party, either plaintiff or defendant, may yet have such a remote or contingent interest in the subject of the action that he may be a proper, or rather not an *improper* party. In these cases, however, he is not *real party in interest* within the meaning of § 111 of the Code.

Van Rensselaer vs. Barringer, 39 N. Y., 9, illustrates that principle.

That was the ground on which Mr. Justice Hand made his ruling in Boyngton vs. the Clinton and Essex Mutual Ins. Co., in 16 Barb., cited above.

Particular circumstances may possibly also exist where the assignee for his own protection against some unfounded claim of the assignor may bring him in as a party, now, the same as he might have done under the former practice in equity.

In Freeman vs. Newton, 3 E. D. Smith, 246, the court held that although *ordinarily the assignee is not a necessary* party, yet in that case allowed the assignee to make the assignor a party with a view to his, the assignee's protection against an unfounded denial by the assignor of having made the assignment.

That case came up in the Court of Common Pleas of New York city, and is only sustainable upon the principle that it was in its nature a suit in equity, and performed the same office as would a bill of interpleader at the suit of the obligor when the alleged assignor and assignee both claimed title to the subject matter of the suit, and the debtor did not know which had the better right.

But all such exceptional cases only the more strongly prove the rule for which the appellant contends.

(7). Wood *vs.* Chew was a pure action at law controlled and governed in all respects as regards the parties and the issues by Common law principles. It was in no respect an action in Equity.

It is however suggested that Walker's administratrix should have been made if not a co-plaintiff, at least a party defendant.

He was a *necessary* party defendant only upon one of two grounds, viz.:

1. That he was a *necessary* co-plaintiff, and refusing to join in the bringing of the suit might, by § 119, of the Code, be named as a co-defendant.

As where one of several joint holders of a bond or bromissory note refuses to join his co-owners in bringing suit and cases of kindred character. Or.

2. That he had such personal interest in the subject matter of the action that a complete judgment could not be given as between the other parties until he was brought in.

That he was not a *necessary* party plaintiff we have endeavored to show.

That a perfect judgment could be given against Chew, and for all the money that was due on the bond, is evident, because Wood, as assignee, had full power to sue and receive the moneys and all of them.

(8). The learned Chancellor of New Jersey suggests that Walker had a right in that suit to be heard as a party upon the defence which Chew interposed, because of danger that collusion between obligor and assignee in fraud of the rights of assignor might otherwise occur.

1. We submit that we are not called upon here to legislate as to what the rule ought to be, but to ascertain what rule the law has ordained.

Both New York and New Jersey do permit the assignee of a bond to maintain an action at law in his own sole name. No restriction has been imposed because the bond is assigned as a collateral.

Both states in such suits, permit the same defences to be set up by the obligor which at the time of the assignment he had against the assignor.

By New Jersey law it has never been held that the assignor should or even could intervene in such an action, and litigate those questions with the obligor.

In point of fact the same rule precisely as to necessary parties both plaintiff and defendant in the suits by assiguees of bonds and the defences which obligors may interpose exists in both New York and New Jersey, and in neither of them is the assignor even a proper party. But should collusion or fraud occur, the assignor has his remedy.

The misapprehension then of the respondent arises from giving to § 111 of the N. Y., Code a construction which would make necessary as parties every one who had any contingent interest in the subject matter of the action, instead of regarding it as making those only necessary parties who by the former rule in equity would have been requisite parties.

It simply changed the rule which made the original obligor or contracting party the necessary plaintiff, and required the one who really held the assigned, or acquired title to bring the suit in his own name.

That is to say

The change effected by the Code was to require always a *real* not a *nominal* party of record. And that is all the change effeeted by the Code of New York in respect to the question at issue here.

FOURTH. Assuming then, that the judgment in Wood vs. Chew, was conclusive and binding upon the personal representative of Peter Walker, and his assigns. it merged the entire bond and the mortgage as collateral to it in the judgment, and the payment of the judgment has extinguished the debt.

(1). The suit was to recover the entire sum principal and interest.

Chew, the defendant, set up a defence which as he claimed authorized him to recoup damages by reason of the fraud in the inception of the bond to its entire amount.

Upon these issues the case was tried.

By the judgment he was permitted to recoup to an amount less than the whole, and the plaintiff took judgment for the remainder.

The learned chancellor has suggested that for aught that appears, the jury may have given their verdict for the amount of Wood's loan to Walker, only.

It is respectfully submitted that such suggestion is both erroneous and immaterial, and entirely inadmissible, as the claim of Wood was for the whole amount of the principal and interest on the bond and tried on that issue, and Chew's claim to recoup.

(2). A judgment of a Court of General Jurisdiction imports absolute verity, and this judgment record, therefore, itself proves all of the facts which upon its face it imports.

That import is that there was due and owing by Chew upon the bond for principal and interest *under the issues raised by the plaintiffs* $2,071.25, *and no more.*

There was no question raised on the record as to what sum Walker owed Wood, the only question being how much Chew owed on the bond, and that the judgment established.

(3). A simple arithmetical calculation shows the amount of the recoupment allowed did not leave a sufficient sum to repay the amount of the loan by Wood to Walker.

The bond was for.....		$3,500 00
Interest to date of verdict, ...		1,696 00
Total Prin. and Int., ...		5,196 00
Wood's loan, 1700 and 200,.....	$1,900	
Int. to date of verdict, ...	856	
	2,756	
Amount of verdict,.....		2,071 25
Recoupment,.....		3,124 75
Woods' claim on Walker was,.....	$2,756 00	
Verdict,.....	2,071 75	
Woods' loss,.....	684 75	

All this calculation is however entirely immaterial, except as showing the erroneous deductions drawn respecting what the record itself on its face imports.

FIFTH. Counsel for the plaintiff in error respectfully refers the court to the NOTES, annexed to this brief as a part of their arguments, as they would read from the writings of learned jurists and elementary authors, the opinions and certificates of judges and late judges of the highest courts and of

eminent counsel in the State of New York in respect to the question as to what effect is due to the judgment in Wood vs. Chew in the courts of that state, and ask for them such consideration as they may appear to be entitled to. The originals will be produced if desired and the printed copies comprise. NOTE A.

NOTE B is composed of extracts from the reported opinions of the court in several of the cases cited in the brief.

NOTE C is a skeleton brief upon a motion which has been suggested to dismiss the writ of error for want of jurisdiction.

Lastly. The counsel for the plaintiff in error respectfully submit that the judgment or decree of the court below should be reversed with costs, and the case remanded to the courts in New Jersey with direction, to dismiss the bill of complaint of the defendant in error with costs.

EDWARD P. COWLES,
JOHN H. REYNOLDS,
Of Counsel for the Plaintiff in Error.

NOTE A.

"We the undersigned Justices of the Supreme Court of the State of New York, have examined 'Exhibit A. in the printed case hereto annexed, and extending from page 34 to page 60 thereof, and we have also read and attentively considered the paper headed Opinion,' purporting to be the opinion of the learned Chancellor of the State of New Jersey, commencing on page 24 of the aforesaid printed case."

"And thereupon we certify as follows:

"By the law of the State of New York, the assignment of the bond made by Peter Walker to Stephen G. Wood, as set forth and pleaded on pages 35 and 36 of the aforesaid printed case passed to and vested in the said assignee, Stephen G. Wood, until redeemed by paying the principal a complete and absolute right of action to sue for, and in his own sole name as the real party in interest in said bond, to recover from Robert Chew, its obligor, the moneys, and all the moneys secured and due in and by said bond."

"And the said obligor, Robert Chew, was lawfully entitled to set up and establish in said action any and every defence to said bond in whole or in part, existing at the time of the assignment, which he could or might have set up as against the said Peter Walker, had such assignment not been made. Neither Peter Walker in his lifetime, nor Catharine Walker, his administratrix, after his death, was a necessary party, either plaintiff or defendant, to the suit set forth in the said Exhibit A, in order to render the judgment exemplified in such Exhibit, a complete and effectual bar by the law of New York, in all the Courts of that State against any other action, upon said bond to the suit of Catherine Walker as administratrix of Peter Walker, aforesaid, or her assigns. And said judgment became, and was, and until set aside or reversed, is in all the Courts of New York, by the law of New York, a complete and perfect bar against said Catharine Walker, as such administratrix, and her assigns, in any suit brought by, or to be brought by her or them upon such bond against the said obligor or his representatives."

"Dated at the City of New York, on the 17th day of February, A.D. 1869." "THEODORE MILLER."

"The law of the State of New York is in my opinion correctly set forth in the foregoing certificate—that is, by the assignment above mentioned the whole legal interest in the bond and mortgage passed to Wood, and Wood though as between him and his assignor, holding them as collateral security for an amount less than that due on the bond and mortgage, could in the State of New York recover the whole amount due thereby. The assignment being absolute, though in part for the ultimate benefit of another party, neither Walker in his lifetime, nor his representatives after his death, were necessary parties to the suit brought in the State of New York; nor had they afterwards, nor have they now a right to enforce the bond and mortgage for any amount, assuming the judgment set forth in the case to have been obtained, as therein stated.

"Dated May, 1869. HENRY HOGEBOOM."

"I concur in the opinion of Judge Hogeboom."

"Brooklyn, May 28th, 1869. J. W. GILBERT."

"I agree with the preceding opinions, and in addition to what Judges Miller and Hogeboom have stated, I think that the question is set at rest by section 113 of the code of procedure. Wood being the trustee of an express trust for such interest as Walker or his representative had in the bond and mortgage."

"12th June, 1869.

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eminent counsel in the State of New York in respect to the question as to what effect is due to the judgment in Wood vs. Chew in the courts of that state, and ask for them such consideration as they may appear to be entitled to. The originals will be produced if desired and the printed copies comprise. NOTE A.

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NOTE B.

In Nelson vs. Eaton, ~~5 Selden~~ 26, N. Y., 413, Judge Selden in his opinion says: "The note constitued a perfect obligation against the defendant. He was bound to pay it to the person having the legal title to it. He was not interested in the trust, and the creation of it had no effect whatever upon his rights or duties. By the indorsement and transfer of the note to the plaintiffs they obtained the legal title to it and the right, the sole right to demand and receive payment of it. The right of action to recover money attends upon the right to demand and receive it, and I think cannot be severed from it. (Flagg v. Munger 5 Seld, 492). If the plaintiffs could not maintain an action on the note, then no one could maintain it, for they alone had the legal title; and it would present a strange anomaly in the law if a note, absolutely due to a living person, could be so placed that no person could maintain an action upon it. If such cases, can exist this is not one of them. The power of sale given to the plaintiffs by the trust contract was designed to give them an authority which, by the mere transfer of the note to them as collateral security, they would not have had. I think it was not designed to take away any power which the transfer of the legal title to the notes gave them. But if such was the design, even if the instrument of trust had contained an express agreement on the part of the plaintiffs, not to sue the notes, it would not have aided the defendant in this action. Having the legal title to the note, they had a perfect right of action against the defendant and he could not avail himself of their covenant with strangers not to prosecute such action (Bank of Chenango vs. Osgood, 4, Wend, 607-612). Such an action might be a breach of trust, but that would not aid the defendant — the trust in no way affecting either his rights or his duties.

The error in the judgment in this case has arisen from a failure to distinguish between the legal and equitable interests in the note which have no connection with each other. The legal interest depends upon the indorsement and transfer of the note by the insurance company to the plaintiffs, and in that alone has the defendant any interest. That transfer being perfect, the plaintiff's right of action was perfect. The trust did not in any way affect it."

In Voorhees vs. Childs, 17 N. Y. Rep. 358, the same learned judge speaking of the rules of pleading and as to parties under the New York code, ~~was~~ the following language;

"The difference in the rule as to parties between courts of law and of equity was not accidental, but had an obvious foundation in reason. Where all persons having an interest in a controversy are made parties, cases are frequently rendered exceedingly complex. Judges can command the time and patience, and may be safely endowed with the discretion required to disentangle their intricacies and dispose of their varied equities. But it is extremely inconvenient, if not impossible, to try such cases by a jury. They are qualified to deal with simple issues only; and the rules of the common law as to parties, as well as those which prevailed in the formation of issues, were adapted to the nature of the tribunal before which the cases were to be tried. The attempt to apply the equitable rule as to parties, to all legal actions, would lead to infinite embarrassment in the trial of jury cases. If, however, the legislature had power to prescribe such a change, and has done so, the courts have no discretion in the matter, but are bound to execute the legislative will.

"Is is supposed by some that it was intended to abolish by the Code all distinction, not only in form but substance, between legal and equitable actions; and it must be conceded that many of its provisions taken by themselves might seem to indicate such an intent; and yet nothing can be clearer than that the legislature has wholly failed to carry into effect such an intention if it existed. On the contrary, the Code expressly retains the principal differences which distinguished the two classes of actions. Actions at law were to be tried by a jury; suits in equity by the court. This distinction remains undisturbed. In legal actions, with few exceptions, compensation in damages was the only mode of redress; while in such as were equitable the relief was adapted to the exigencies of the case. The Code makes no change in this respect. In one of these classes of action costs were recoverable by the successful party as a matter of course; in the other, they rested in the discretion of the court. This remains as before.

"Now it is plain, that if we would make of the Code a consistent system, one that can be practically administered, we must construe it, not in view of the general proposition, obviously untrue, that the distinctions between actions at law and suits in equity are abolished, but in the light afforded by a comparison of its various provisions. Take, then, the case in hand. Is it reasonable, in view of the important distinctions thus made by the Code itself between legal and equitable actions, to hold that it was intended that section 118 should apply to both these classes? Let us look at some of the difficulties to which this would lead. The mode of trial depends upon the nature of the action. Those which merely seek to recover a sum of money are to be tried by a jury. The legislature was forced to adopt this provision by the constitution, which preserves trial by jury in all cases where it had theretofore existed.

"If, however, the action involves anything whatever besides the recovery of money, unless it be for the recovery of specific real or personal property, or to obtain a divorce, if it seek the least modification of the judgment in respect to any of the parties, it then becomes triable by the court. The language of the Code is, that 'an issue of fact in an action for the recovery of money *only* * * * must be tried by a jury.' It is easy to see, therefore, that if section 118 is to receive the construction contended for, most actions for the recovery of money, as well as actions for the recovery of specific, real or personal property by bringing in parties having some equitable interest, real or supposed, in the controversy, may readily be converted into actions to be tried by the court instead of a jury. Has the legislature power thus to subvert, or enable parties to evade, an important constitutional provision? If there is any one clause of the constitution which the courts are under greater obligation to protect from all encroachment than others, it is that which preserves trial by jury; and it is clearly impossible for them, in view of their duty in this respect, so to construe the provisions of the Code as to render all actions, legal as well as equitable, triable by the court at the option of the plaintiff.

"But there are other embarrassments in the way of the construction of section 118, for which the plaintiff contends, growing out of the provisions of the Code in respect to costs. It will be found difficult if not impossible to reconcile that construction with those sections which give costs of *course* to the successful party in all actions for the recovery of money or of specific real or personal property. In actions of ejectment especially, where so many collateral and subordinate equities frequently exist, the task of harmonizing

the equity rule as to parties with the common law rules as to costs, and as to the mode of trial, would be attended with serious embarrassment.

"Taking the Code then as a whole, and comparing its various provisions with each other, it seems evident that the legislature never intended section 118, to receive a construction which would authorize a suit like the present. Although all the difficulties which have been suggested, might not arise is this case, yet the section in question can only receive one of two interpretations. It must either be confined strictly to actions of an equitable nature, to which alone it seems appropriate, or it must extend to actions of every kind, whether legal or equitable; and I have no hesitation in holding, for the reasons suggested, that it should be regarded as a mere statutory adoption of the equitable rule on the subject of parties, and was intended to have substantially the same application. The language of the section itself points to this interpretation. It authorizes the bringing of all those who are *necessary* parties "to a complete determination or settlement of the questions involved." This language is inappropriate to actions for the recovery of money only, or of specific real or personal property; but embraces the very gist of the rule which has always prevailed in equitable actions.

"It is worthy of remark that the construction here contended for, is that which has been of necessity to a very great extent practically put upon the various provisions of the Code. Cases are found so naturally to arrange themselves according to the classification which existed prior to the Code, that the distinction between legal and equitable actions, is nearly as marked upon all the papers presented to the courts as formerly. The same names are not used, but the nature of the cases has not changed, nor have the distinctions been abrogated. Very few attempts have been made to carry into practical effect the idea of blending legal and equitable causes of action in one common proceeding. Were it necessary to the decision of this case, I should be prepared to hold, that that clause of the constitution which provides, that "There shall be a Supreme Court having general jurisdiction in *law and equity*," presents an insuperable barrier to any legislative merger of the two jurisdictions. While the legislature may, as it has done, abolish the distinctions which existed in mere matters of form, yet it is easy to show that to blend the two in respect to matters of substance and principle, would be virtually *to subvert* the jurisdiction of the court in regard to the one or the other; which the legislature clearly has not the power to do. But I will not pursue this topic farther, as the conclusion to which I have arrived seems to me fully warranted by the previous reasoning."

As to the power of the assignee of a chose in action as a collateral security for a debt smaller than the thing assigned, the cases of Allen vs. Randolph, 4 Johns. Ch. R., 693, is specially referred to.

So also the case of Moses vs. Margatroyd, 1 Johns. Ch. R., 119, 127, 129, where at page 129, Chancellor Kent says: "These collateral securities are in fact trusts created for the better protection of the debt, and it is the duty of this court to be that they fulfil the design."

The attention of the court is specially called to the case of Bush vs. Lathrop, 22 N. Y. Rep., 535, as to the right of Chew to interpose the defence of fraud in the action by Wood, upon the bond.

NOTE C.

SUPREME COURT.—UNITED STATES.

Louisa Chew, Plaintiff in Error,

against

Richard J. Brumagen, Defendant in Error.

Brief of Plaintiff in Error on motion by defendant in Error to dismiss the suit.

The defendant in error, Brumagem as complaint in the court below filed his bill in the New Jersey Chancery to foreclose a mortgage charged upon lands in that state.

The plaintiff in error as respondent in that suit, in the answer, pleaded a judgment recovered in the Supreme Court of New York, entitled Stephen G. Wood against Robert Chew, and set up that in and by said judgment the mortgage in question had with the bond which it accompanied, been in said judgment and ~~with~~ bond and mortgage had by payment ment been extinguished; in other words that by the law of New legal effect of said judgment operated an extinguishment of the and mortgage. And that such judgment became and was a compl and effectual bar to such foreclosure suit in the New Jersey Chancery.

The precise question under Mrs. Chew's answer, therefore, was what force and effect the New York judgment in and by the law of New York had or carried with it in the tribunals of that state upon the bond and mortgage which was the subject matter of the litigations in the New Jersey Chancery.

Did that New York judgment by New York law or in the tribunals determine and definitively settle the amount that was due upon the said bond and mortgage, and was the verdict and judgment aforesaid binding and conclusive as regards the amount upon Brumagem provided he had sued upon such bond in the courts of New York after the rendition of that New York judgment in Wood vs. Chew. If such was the force and effect of the judgment in Wood vs. Chew in and by the law of New York then it was conceded both by the chancellor, and by the New Jersey Court of Error and Appeals that the same force and effect must be accorded to it in the courts of New Jersey, and in such case that the bar to the foreclosure suit in New Jersey pleaded by Mrs. Chew would be a sound plea which she was entitled to maintain.

But the New Jersey Court of Errors and Appeals held and adjudged that in and by the laws of New York the force and effect of the judgment in Wood vs. Chew was not in and by the law of New York and in her courts conclusive upon the bond and mortgage in question which was the subject matter of such litigation in the New Jersey Chancery suit as Mrs. Chew set up and pleaded it to be, holding that in and by New York law the said judgment did *not* settle and determine as against Brumagem the amount that was due upon the bond, that such judgment was not conclusive in New York or binding upon Brumagem and would not be so adjudged to be in New York

the equity rule as to parties with the common law rules as to costs, and as to the mode of trial, would be attended with serious embarrassment.

"Taking the Code then as a whole, and comparing its various provisions with each other, it seems evident that the legislature never intended section 118, to receive a construction which would authorize a suit like the present. Although all the difficulties which have been suggested, might not arise is this case, yet the section in question can only receive one of two interpretations. It must either be confined strictly to actions of an equitable nature, to which alone it seems appropriate, or it must extend to actions of every kind, whether legal or equitable; and I have no hesitation in holding, for the reasons suggested, that it should be regarded as a mere statutory adoption of the equitable rule on the subject of parties, and was intended to have substantially the same application. The language of the section itself points to this interpretation. It authorizes the bringing of all those who are *necessary* parties "to a complete determination or settlement of the questions involved." This language is inappropriate to actions for the recovery of money only, or of specific real or personal property; but embraces the very gist of the rule which has always prevailed in equitable actions.

"It is worthy of remark that the construction here contended for, is that which has been of necessity to a very great extent practically put upon the various provisions of the Code. Cases are found so naturally to arrange themselves according to the classification which existed prior to the Code, that the distinction between legal and equitable actions, is nearly as marked upon all the papers presented to the courts as formerly. The same names are not used, but the nature of the cases has not changed, nor have the distinctions been abrogated. Very few attempts have been made to carry into practical effect the idea of blending legal and equitable causes of action in one common proceeding. Were it necessary to the decision of this case, I should be prepared to hold, that that clause of the constitution which provides, that "There shall be a Supreme Court having general jurisdiction in *law and equity*," presents an insuperable barrier to any legislative merger of the two jurisdictions. While the legislature may, as it has done, abolish the distinctions which existed in mere matters of form, yet it is easy to show that to blend the two in respect to matters of substance and principle, would be virtually *to subvert* the jurisdiction of the court in regard to the one or the other; which the legislature clearly has not the power to do. But I will not pursue this topic farther, as the conclusion to which I have arrived seems to me fully warranted by the previous reasoning."

As to the power of the assignee of a chose in action as a collateral security for a debt smaller than the thing assigned, the cases of Allen vs. Randolph, 4 Johns. Ch. R., 693, is specially referred to.

So also the case of Moses vs. Margatroyd, 1 Johns. Ch. R., 119, 127, 129, where at page 129, Chancellor Kent says: "These collateral securities are in fact trusts created for the better protection of the debt, and it is the duty of this court to be that they fulfil the design."

The attention of the court is specially called to the case of Bush vs. Lathrop, 22 N. Y. Rep., 535, as to the right of Chew to interpose the defence of fraud in the action by Wood, upon the bond.

NOTE C.

SUPREME COURT.—UNITED STATES.

Louisa Chew, Plaintiff in Error,

against

Richard J. Brumagen, Defendant in Error.

Brief of Plaintiff in Error on motion by defendant in Error to dismiss the suit.

The defendant in error, Brumagem as complaint in the court below filed his bill in the New Jersey Chancery to foreclose a mortgage charged upon lands in that state.

The plaintiff in error as respondent in that suit, in the answer, pleaded a judgment recovered in the Supreme Court of New York, entitled Stephen G. Wood against Robert Chew, and set up that in and by said judgment the mortgage in question had with the bond which it accompanied, been merged in said judgment and ~~with~~ bond and mortgage had by payment of said judgment been extinguished; in other words that by the law of New York, the legal effect of said judgment operated an extinguishment of the said bond and mortgage. And that such judgment became and was a complete and effectual bar to such foreclosure suit in the New Jersey Chancery.

The precise question under Mrs. Chew's answer, therefore, was what force and effect the New York judgment in and by the law of New York had or carried with it in the tribunals of that state upon the bond and mortgage which was the subject matter of the litigations in the New Jersey Chancery.

Did that New York judgment by New York law or in the tribunals determine and definitively settle the amount that was due upon the said bond and mortgage, and was the verdict and judgment aforesaid binding and conclusive as regards the amount upon Brumagem provided he had sued upon such bond in the courts of New York after the rendition of that New York judgment in Wood vs. Chew. If such was the force and effect of the judgment in Wood vs. Chew in and by the law of New York then it was conceded both by the chancellor, and by the New Jersey Court of Error and Appeals that the same force and effect must be accorded to it in the courts of New Jersey, and in such case that the bar to the foreclosure suit in New Jersey pleaded by Mrs. Chew would be a sound plea which she was entitled to maintain.

But the New Jersey Court of Errors and Appeals held and adjudged that in and by the laws of New York the force and effect of the judgment in Wood vs. Chew was not in and by the law of New York and in her courts conclusive upon the bond and mortgage in question which was the subject matter of such litigation in the New Jersey Chancery suit as Mrs. Chew set up and pleaded it to be, holding that in and by New York law the said judgment did *not* settle and determine as against Brumagem the amount that was due upon the bond, that such judgment was not conclusive in New York or binding upon Brumagem and would not be so adjudged to be in New York

in her courts, and so was no bar to the foreclosure in the New Jersey Chancery.

Thus under the provisions of U. S. Constitution, Art 4, § 1, and the Act of Congress of 1790, there arose a question in the court of last resort in New Jersey as to that "full faith and credit" to which the judgment of a sister state was entitled in the tribunals of the state in which such judgment was rendered and the New Jersey court of last resort denied to such judgment that faith and credit and force and effect on the subject matter of the litigation before it which the party pleading such judgment claimed for it in and by the pleading.

The whole controversy too in the New Jersey Chancery turned upon that precise question, for if Mrs. Chew maintained her plea it barred the suit against ~~him~~ while failing to maintain it the determination of the suit was adverse to her.

The party so pleading the New York judgment and claiming to have been so aggrieved is the one bringing this writ of error.

It follows, therefore, that this court has jurisdiction to entertain this writ of error.

Mills vs. Duryea, 7, Cranch, 481.
Greene vs. Van Burkirk, 5, Wallace, 307.

IN THE

SUPREME COURT OF THE UNITED STATES.

LOUISA CHEW, PLAINTIFF IN ERROR,

against

RICHARD J. BRUMAGIM DEFENDANT IN ERROR.

Amended Brief for Plaintiff in Error.

The counsel for the defendant in error assails the jurisdiction of this court, upon the general allegation that the record does not disclose the fact that any question arose under the constitution or laws of the United States which was decided adversely to the plaintiff in error.

It is submitted that the propostion relied on to oust this court of jurisdiction is neither well founded in fact or in law. Reduced to its logical result it is this. The courts of New Jersey have and expressed becoming reverence for the judgment of the courts of New York and intend to give to it the same force and effect as the courts of New York would do, but the courts of New York would not give it any effect in the present case, and we do the like.

The infirmity of this syllogism is what logicians might and probably would call the "*petitio principii*," and it obviously proves too much, for if the courts of one state may refuse to give effect to judgments rendered in the courts of another upon a misconstruction of the law of the state in which the judgment was rendered, the unfortunate suitor in the foreign court would have no protection under the constitution unless, as in this case, he might ask this court to decide that the courts of New Jersey erred in saying that by the law of New York, the judgment of Wood vs. Chew et al., was not binding upon Walker and his representatives.

The precise question is therefore very simple in form at least, against the jurisdiction; it is said that the New Jersey court gave the same effect to the New York judgment that the courts of New York would have done, and this we deny.

We pleaded the New York judgment in bar, and claimed it as a complete estoppel, and this is apparent from the record. Indeed it was the only substantial issue, and we claiming that by the law of New York the judgment was a complete bar as against Walker and his representatives; the New Jersey court denied our claim and said the judgment was no bar because it would not be decreed a bar by the laws of New York. Now we desire to show to this court that by the law of New York the judgment of Wood vs. Chew, was a complete bar against Walker and his representatives. May this not be done? And if done can it be said that the courts of New Jersey have given the plaintiff in error the full benefit of the New York judgment.

Clearly not, and this court has jurisdiction to correct the error.

EDWARD P. COWLES,
JOHN H. REYNOLDS,
Of Counsel for Plaintiff in Error.

Murphy & Bechtel, Printers, Trenton.

SUPREME COURT OF THE UNITED STATES.

Louisa Chew,
Plaintiff in Error,
vs.
Richard J. Brumagim,
Defendant in Error.

On Bill to Foreclose, &c.

In Error to the Court of Errors and Appeals in the last resort of the State of New Jersey.

Brief of Defendant in Error.

The controversy in this cause arose upon the filing, in the Court of Chancery of New Jersey, of a bill to foreclose a mortgage given by Robert Chew to Peter Walker, a resident of the State of New Jersey, and by the said Walker and others assigned, for a valuable consideration, to Richard J. Brumagim, the complainant in the court below, and the defendant in error in this court.

The facts were these: Peter Walker, in the year 1851, was seized in fee of a valuable farm, situate in the county of Middlesex, New Jersey. On the 13th of March, 1851, Walker sold and conveyed this farm to Robert Chew.

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The facts were these: Peter Walker, in the year 1851, was seized in fee of a valuable farm, situate in the county of Middlesex, New Jersey. On the 13th of March, 1851, Walker sold and conveyed this farm to Robert Chew.

The consideration was		$7000
Paid as follows:		
By cash, ...	$1500	
By mortgage assumed, ...	2000	
By mortgage given, . . .	3500	
		$7000

The mortgage given by CHEW to Walker to secure $3500, one half of said consideration, is the mortgage now in dispute.

It is set out in full in Transcript, p. 55, and the bond, which it secured, p. 59.

After the execution of this mortgage for $3500, PETER WALKER, the mortgagee, became indebted to one STEPHEN G. WOOD in the sum of $1700, and on the 18th of November, 1851, WALKER having previously given to WOOD his note for that amount, assigned to Wood the bond and mortgage in question, as *collateral* security for the payment of this note.

Deed of Assignment, Transcript, p. 60.

The assignment is expressly stated in the deed to be as *collateral.* On the 16th of February, 1852, WALKER having effected a further loan of $200 from WOOD, endorsed upon the deed of assignment an agreement or stipulation, that the bond and mortgage theretofore assigned, should be held by the said WOOD as *collateral* for this last loan also.

This stipulation is on Transcript, page 60.

So that, on the 16th of February, 1852, this bond and mortgage of CHEW for $3500 were held by STEPHEN G. WOOD, assignee of PETER WALKER, the mortgagee, as *collateral* security for $1900, then due to him from WALKER.

And the right to and interest in them of Stephen G. Wood, was no other or further than to hold them as security and in pledge for said loans.

Story on Bailments, §§ 307, 323.

After holding this bond and mortgage for some years, on the 10th of December, 1857, WOOD assigned them to MARTIN F. BRAISTED.

Assignment, Transcript, p. 61.

And on the 9th of April, 1859, PETER WALKER having in the meantime died, CATHARINE WALKER, his widow and

administratrix, together with BRAISTED, assigned the bond and mortgage to RICHARD J. BRUMAGIM, the complainant below, and the defendant in error here.

Assignment, Transcript, p. 62.

By virtue of this last assignment, RICHARD J. BRUMAGIM became entitled to and possessed of all the right to the bond and mortgage of WOOD, who held them as collateral, and of WALKER, the original mortgagee.

BRUMAGIM filed his bill to foreclose the mortgage in the Court of Chancery of New Jersey, on the 13th of February, 1864, and on the 13th of September, 1864, LOUISA CHEW, present owner of the mortgaged premises, filed her answer.

Bill, Transcript, pp. 4, 5, 6, 7, 8.

Answer, Transcript, pp. 10, 11, 12, 13, 14, 15, 16.

The bill is in the usual form of a bill for the foreclosure of a mortgage.

It states the indebtedness of CHEW to WALKER, the execution of the bond and of the mortgage to secure it, the various assignments of the mortgage and the bond secured by it, and charges the failure to pay and satisfy the bond, and prays the aid of the court to obtain the relief necessary, to wit, a decree of foreclosure of the equity of redemption, and the sale of the mortgaged premises.

The answer admits the original debt; the execution of the bond and mortgage; the failure by the mortgagor, or of any one on his behalf to pay the bond, and the breach of the condition in the mortgage.

The answer then alleges, by way of defence, the fact that WOOD, to whom the bond had been assigned as collateral, had commenced and prosecuted an action in the Supreme Court of New York, to recover from CHEW the interest then due upon the bond, to be applied to the payment of WALKER'S indebtedness to him. That while the action was in progress, and before it was determined, by the condition of the bond the principal became due and payable; and that in the meantime WALKER had died. That thereupon the respective attorneys for WOOD and for CHEW entered into a stipulation that the plaintiff in that action (WOOD) should have the same relief as if he had stated in his original de-

mand that the principal, as well as the interest, was due according to the tenor of the bond; and the defendant such further defence as he might be entitled to by the death of WALKER, and that Catharine Walker should be made a party to the action.

The answer further alleged that upon the issues joined in that action, a trial was had and a verdict for $2071.75 was rendered for the plaintiff.

Transcript, p. 54.

And the insistment of the answer was that the suit in New York upon the bond, under the circumstances stated, afforded a complete bar to the suit for the foreclosure of the mortgage in New Jersey.

The allegation of the plaintiff in error on that point, is on page 14 of Transcript.

A replication was filed denying the facts set up in the answer on February 9th, 1865, and putting the cause at issue. Some testimony was taken. The cause was duly argued before the Court of Chancery at the October Term, 1867, and a decree was made in favor of the complainant, for the balance due upon the bond, after deducting the amount recovered in the suit in New York. A motion for rehearing was argued soon after, and refused. An appeal was then taken to the Court of Errors and Appeals of New Jersey. The cause was there argued at the March Term, 1870, and the decree of the Chancellor was in all things affirmed. And thereupon a writ of error was taken, and the cause brought before this Honorable Court.

The opinion of the Chancellor is on page 69 of Transcript.

The interlocutory decree on page 30. The final decree on page 33.

The opinion of the Court of Errors and Appeals, delivered by Mr. Justice Van Syckel, is on page 64 of the Transcript, and the decree on page 35 of the Transcript.

I. The first question which arises on these facts is, Has this court any jurisdiction of this cause at all?

1. The judiciary act of 1789, (1 *Statutes at Large* 244,) conferred upon this Court power to review decisions of state courts. This enactment stood unchanged until the act of

February 5th, 1867, (14 *Statutes at Large* 386.) This latter act, in fact, did not, in express terms, repeal the act of 1789, but partially superseded it by its more extended terms. Under the provisions of this act of 1867, a final judgment of a state court can be reviewed by this court,

(1.) When, in such suit, is drawn in question the validity of a statute of, or an authority exercised under the United States, and the decision is against their validity; or

(2.) Where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or

(3.) Where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute, or any commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority.

It seems to be evident, upon the mere statement of these limitations upon the character of causes which can be removed from state tribunals into this court for review, that this cause cannot, by any fair construction of these limitations, be included among them. Surely it is evident that in the cause at bar, the validity of a treaty or statute of, or an authority exercised under the United States, has not been questioned. Nor has any question been made that a statute or authority exercised under any state, is repugnant to the constitution, treaties and laws of the United States; nor has there been any attempt so to construe any clause of the Constitution, or a treaty, statute of, or commission had under the United States as to deny its validity. This is simply a suit for the foreclosure of a mortgage—in which has been set up as a defence an alleged action at law in New York, upon the bond for which the mortgage had been given as security, and its consequent extinguishment. The only constitutional provision involved in the judgment of the courts in New Jersey is that requiring full faith and credit

to be given in each state to the public acts, records and judicial proceedings of every other state, and the only statute in question is that regulating the practice of the law in the state of New York; and the courts of New Jersey, in which this matter was heard, have declared, in the most positive terms, that they were bound by that constitutional provision and by that statute, and by the judicial determination of its provisions by the courts of New York, as found in the Reports, and that their final decision was based upon and was in entire harmony with that provision of the Constitution, the statute and those reported decisions.

The plaintiff in error cannot deny this. She can only claim that there is a conflict in the reported decisions of the Courts of New York as to the proper and correct practice of law in that state touching the point in dispute, to wit, who are the proper and necessary parties to an action at law upon a bond assigned as collateral security. But the defendant in error respectfully submits that the power granted to this Honorable Court is not to correct alleged errors of judgment made by a state judiciary, in the decision of questions so clearly and solely within their jurisdiction as this is. Besides the weight of the various decisions of the New York courts upon the disputed practice involved in this case, has been carefully balanced by the courts of New Jersey. Will this Honorable Court condescend to review their opinion on this point, be it ever so wrong?

The principle which governs this case is this: That a controversy, in which no right is claimed under the constitution or laws of the United States, but which turns entirely upon the validity or interpretation of state laws, is exclusively within the jurisdiction of state courts, and no appeal lies from their judgment to the Supreme Court of the United States.

In support of this principle, reference is made to the following cases:

McBride v. *Hoey*, 11 *Peters* 167. In this case Mr. Chief Justice Taney says: The Supreme Court has no power to revise the decree of a state court, when no question was raised or decided in the state court upon the validity or con-

struction of an act of congress, nor upon the authority exercised under it, but on a state law only.

In the case of *Lawler et al.* v. *Walker*, 14 *Howard* 149, Mr. Justice Wayne, in the opinion of the court, says: "It is the peculiar province and privilege of the state courts to construe their own statutes;" and when they did so, "it was no part of the functions of this court to review their decisions;" or in such cases, "to assume jurisdiction over them, on the pretence that their judgments have impaired the obligation of contracts."

In the case of *Congdon* v. *Goodman*, 2 *Black* 574, Mr. Chief Justice Taney says: "A controversy in which no right is claimed under the constitution or laws of the United States, but which turns entirely upon the validity or interpretation of state laws, is exclusively within the jurisdiction of the state court, and this court has no appellate power over its judgment."

In the case of *Worthy* v. *The Commissioners*, 9 *Wallace* 611, Mr. Chief Justice Chase, in delivering the opinion of the court, says: "It is manifest that this court has no jurisdiction of the present cause. There was no decision by the Supreme Court against the validity of any treaty or act of congress, or authority exercised under the United States, nor in favor of the validity of a statute of, or authority exercised under a state, and alleged to be repugnant to the constitution, treaties, or laws of the United States."

Grand Gulf R. R. *v.* Banking Co., 12 Howard 165.
Gill *v.* Oliver's Executors, 11 Howard 529.
Williams *v.* Oliver, 12 do. 111.
Linton *v.* Stanton, 12 do. 423.
Smith *v.* Hunter, 7 do. 738.
Udell *v.* Davidson, 7 do. 769.
Neilson *v.* Lagow, 7 do. 772.
Mills *v.* St. Clair, 8 do. 569.
Baltimore R. R. *v.* Nesbit, 10 do. 395.
Maryland *v.* B. & O. R. R., 3 do. 534.

So, too, where the record shows that the state court might have disposed of the case, and from aught that appears, did decide it, without deciding any questions under an act of con-

gress, &c., against the plaintiff in error, the Supreme Court of the United States has no jurisdiction.

Ocean Ins. Co. *v.* Polleys, 13 Peters 157.

2. There is nothing upon the record which can give this court jurisdiction.

It is well settled that no error can be considered unless it appear upon the face of the record.

Inglee *v.* Coolidge, 2 Wheat. 363.
Miller *v.* Nichols, 4 Wheat. 311.
Maxwell *v.* Newbold, 18 Howard 511.
Walker *v.* Villavaso, 6 Wallace 124.

In *Crowell* v. *Randall*, 10 *Peters* 368, the court, in applying this principle, says: "To give the court jurisdiction, two things should occur and be apparent on the record: first, that some one of the questions stated in the section did arise in the court below; and second, that a decision was actually made thereon by the same court, in the manner described by the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable that they did exist and were made. It is not, however, indispensable that it should appear on the record *in totidem verbis*, or by direct and positive statement that the question was made, and the decision given by the court below on the very point; but is sufficient, if it is clear from the facts stated, by just and necessary inference, that the question was made; and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment."

The cases upon this question establish the following rules: In order to bring a case within section 25 of the Judiciary act, it must appear on the face of the record, (1) that some one of the questions stated in that section did arise in the state court. (2.) That the question was decided by the state court as required in the same section. (3.) It is not necessary that the question should appear on the record to have been raised, and the decision made in direct

and positive terms—*ipsissimis verbis;* but it is sufficient, if it appears by clear and necessary intendment that the question must have been raised and must have been decided, in order to have induced the judgment. (4.) It is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown on the record that it did arise and was applied by the state court to the case.

1 Abbott's U. S. Practice 330.

In applying this rule, that the jurisdictional question must appear by the record, the Supreme Court will, in general, look only to the record. The pleadings, bills of exception, or certificate of the court, are the only sources of the jurisdiction.

Medberry *v.* Ohio, 24 Howard 413.

The assignment of errors, or the published opinion of the court, cannot be reviewed for this purpose. These make no part of the record proper.

Porter *v.* Foley, 24 Howard 415.
Reed *v.* Marsh, 13 Peters 153.
Mobile *v.* Eslava, 16 Peters 234.

Applying these rules, it is apparent that the record in this case discloses nothing upon which the jurisdiction of this court can attach.

The case, as it appears by the Record before the Court, briefly is this: A bond for $3500, secured by a mortgage on lands in New Jersey, is assigned by a debtor to his creditor in New York, as collateral security for a debt of $1900. The creditor brings an action at law in New York to recover such proportion of the principal and interest due upon the bond as will pay and satisfy the debt for which it is held as collateral. He prosecutes his action successfully and obtains a verdict for $2091.25—$1400 less than the principal of the bond. To recover the balance, a bill is filed in the Court of Chancery of New Jersey by one who united in himself the rights of the collateral assignee and the original mortgagee and assignor, to foreclose the mortgage. A judgment is obtained, which, while it decrees a foreclosure and a sale of the mortgaged lands, expressly provides that the amount of the verdict recovered in New York on the suit

upon the bond, must be deducted from the principal of the bond, and the mortgaged lands to stand as security for the balance only. Where, upon this record, then, appears any of the questions which give this court jurisdiction in appeals from state tribunals? What part of the record shows that there was any decision of such questions by the state courts in the way required by the judiciary act, as to confer upon the plaintiff in error the right to be before this court.

If the insistment be that by necessary inference it appears that the judgment of another state was considered by the courts of New Jersey in arriving at their judgment, the answer is, the record, itself, shows that full faith and credit were given to that judgment by the courts in New Jersey, and the plaintiff in error can require nothing more. The constitutional provision has been recognized and admitted, and the plaintiff in error had the full benefit of it. What more can be demanded?

II. If, however, this case does come within the prescribed jurisdictional limits of this court, the next insistment is that there was no error in the judgment of the court below.

There is but one question presented by the record for consideration: What was the true and legal effect of the judgment in New York upon the bond secured by the mortgage in question?

The plaintiff in error insists that it operated as an extinguishment of the bond, and that upon the payment thereof, the debt secured by the mortgage was satisfied, and the mortgage thereby discharged. On the other hand, the defendant in error claims that the whole effect of the judgment was simply the reduction, *pro tanto*, of the amount

due upon the bond, and that he has the right to look to the security for the balance.

In discussing this two questions arise—

(1.) Was Walker a necessary party to the suit upon the bond instituted by WOOD against CHEW in New York? and

(2.) If so, was he an actual party to that suit?

1. Was Wood a necessary party to the suit upon the bond, instituted by Wood against Chew, in New York?

It is a well settled principle that to make a judgment binding and effective, the court must have jurisdiction over both the cause and all the necessary parties thereto—or, as it is sometimes expressed, over the parties and things to be affected.

Flanders *v.* Etna Ins. Co., 3 Mason C. C. 158.
Story's Conflict of Laws 492–4.

The Supreme Court of New Jersey, in reviewing the case in MASON and approving it, says: "This rule is based simply upon natural justice, and is the foundation of those decisions in New Jersey, which hold that a judgment obtained in another state has the same effect in New Jersey as in the state where obtained, only in case the defendant against whom it was obtained had been actually brought within the jurisdiction of the court by service of process, or voluntary appearance."

Moulin *v.* Insurance Co., 4 Zabriskie 222.

This rule that all parties in interest must be before the court, is based on two principles.

(1.) That the rights of no man shall be finally adjudicated in a court of justice unless he himself is present, or at least has had opportunity to appear and vindicate his rights.

(2.) When an adjudication is made upon a particular subject matter, the rights of all parties whose interests are immediately connected with that adjudication, and affected by it, shall be provided for, as far as they reasonably may be.

Bissel *v.* Briggs, 9 Mass. 462.
Newell *v.* Newton, 10 Pick. 472.
Healy *v.* Root, 11 Pick. 390.

Welburn *v.* Woodworth, 5 Johns. 41.
Fenton *v.* Garlick, 8 Johns. 197.
Borden *v.* Fitch, 15 Johns. 121.
Shumway *v.* Stillman, 4 Cowen 294.
Same case in Error, 6 Cowen 449–453.
Starbuck *v.* Murray, 5 Wend. 148.
Mervin *v.* Kumbel, 23 Wend. 293.
Adams *v.* Roe, 2 Fairfield 95.
Whittier *v.* Wendal, 7 N. H. 257.
Aldrick *v.* Kinney, 4 Conn. 380.
Wemway *v.* Pauling, 5 Gill & Johns. 500.
Hodge *v.* Deane, 1 Yerger 125.
Rogers *v.* Colman, Hard. 413.
Rust *v.* Frothingham, 1 Breese 259.
Miller *v.* Miller, 1 Bailey 244.
Oakley *v.* Aspinwall, 4 Comst. 513.
Hackburt *v.* Hope Ins. Co., 4 How. Pr. 275.
Brewster *v.* R. R. Co., 5 How. Pr. 183.
Rose *v.* Hinley, 4 Cranch 269.
D'Arcy *v.* Ketchum, 11 Howard 165.

Who were, then, the necessary parties to this suit in New York upon the bond, so that a judgment obtained there should be binding and conclusive?

Wood was interested in the bond to the extent of $1900, it having been assigned to him as collateral security for that amount.

Walker was interested in the same bond to the extent of $1600, that being the amount due to him after the satisfaction of the debt for which it was held by Wood as collateral, and Chew was interested in the bond to the extent of $3500, for that was the amount which he had obligated himself to pay to Walker. It is apparent, therefore, that Wood, Walker and Chew were the real parties in interest

Now, by the Code of Procedure of the State of New York, this principle that all parties in interest must be before the court to perfect an adjudication, is affirmed in express terms.

The Code enacts: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section one hundred and thirteen."

Code, (Edition 1853) § 111, p. 81.

And this exception is in these words: "An executor or administrator, a trustee of an express trust, or a person ex-

pressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted."

Code, (Edition 1853) § 113, p. 85.

And by the same section, a trustee of an express trust is defined to be a "person with whom, or in whose name, a contract is made for the benefit of another."

If WALKER then was a party in interest, under the § 111 of the code, the action should have been prosecuted in his name. Now, certainly, the plain meaning of the words of this section would include both WOOD and WALKER, for, as we have seen, both were interested in the event of the suit for the recovery of the principal of the bond. But the record shows that the action is prosecuted to judgment in the name of WOOD alone.

Transcript, pp. 54, 55.

To avoid the effect of this the plaintiff in error insists that WALKER was not a necessary party, and that the true effect of § 111 was simply to change the common law rule, that a *chose in action* was not assignable so as to enable the assignee to sue thereon in his own name. That it was designed, in other words, merely to make the assignment good and effectual in the law, and to clothe the legal title with the right to sue.

But if this were the true construction of this section, what becomes of § 113? What conceivable necessity exists for it? Surely, if the person holding the legal title is the *only* real party in interest under the § 111, it was not necessary to enact that "an executor or administrator, or a trustee of an express trust," might sue, without joining those beneficially interested. A "trustee of an express trust," without doubt, has the legal title to a *chose in action*, held for his *cestui que trust.* If so, construing the § 111 as the plaintiff insists, he can sue in his own name as the real party in interest, and § 113 becomes a nullity. So, too, with executors; they have the legal title, but not the beneficial interest. If they could maintain an action in their own name under the § 111, as the "real parties in interest," why enact the § 113 for no other purpose than to confer on them a

right and power which they already possessed? To give this construction to the term "real party in interest," must necessarily be violated a plain rule of statutory construction, by depriving an express exception of all meaning and purpose whatever. In fact, the effect of this construction would be to exclude from the operation of the § 111 those who had the "beneficial interest," and to include those only who held the "legal title." And this is absurd.

What, then, was the design contemplated by the § 111? Evidently it was to establish a procedure, theretofore unknown to Courts of common law, and to assimilate the practice in courts of law with respect to parties, with that which governed in courts of equity.

A hasty reference to other sections of the code, distinctly shows this: Thus § 117 enacts that "all persons having an interest in the subject matter of the controversy, may be joined as plaintiffs." The § 118 enacts that "any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." § 119 enacts "that of the parties to the action, those who are united in interest must join as plaintiffs or defendants, but if the consent of any one who should have joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint." § 122 enacts that "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court *must* cause them to be brought in."

Code, (Edition of 1853) pp. 92, 94, 98.

Other sections, which need not be quoted, are, also, plainly based upon the idea which the Codifiers had, that all parties concerned must be before the court, to make an adjudication final and complete. That this was their intention is manifested clearly by themselves in their report. They say: "The rules respecting parties in the courts of

law, differ from those in the courts of equity. The blending of the jurisdictions makes it necessary to revise these rules to some extent. In doing so we had a three fold purpose in view. First—to do away with the artificial distinctions existing in the courts of law, and to require the real party in interest to appear in court as such. Second—To require the presence of such parties as are necessary to make an end of the controversy. And third—To allow otherwise great latitude in respect to the number of parties who may be brought in."

Codifiers' Report, Title III, p. 123.

Again: "The true rule is that which prevails in the court of equity, that he who has the right is the person to pursue the remedy. The courts of law generally administer justice between those parties only who stand in the same relation to each other; while courts of equity bring before them various parties standing in different relations, that the whole controversy may be settled, if possible, in one suit, and others be avoided. This reasonable and just rule we would adopt for all actions. It is for the interest neither of the suitor nor of the state, that there should be several suits to settle one controversy, so long as one will do it as well. We have had no hesitation in providing, therefore, as we have done by § 102 (now § 122) that when a complete determination of the controversy cannot be had without the presence of parties not at first brought before the court, the court must direct them to be made parties."

Codifiers' Report, Title III, p. 124.

In a note to the § 111, in *Voorhees' Code of Procedure*, (Edition of 1853) *pp.* 81, 82, the annotator says: "The present code has adopted, with slight modifications, the rule in relation to parties which formerly obtained in courts of equity, and with the exception in § 113, the suit must be prosecuted in the name of the party in interest, and the rule which prevailed in equity may be very safely applied to cases under the code." Again: "It seems impossible, when reviewing the analogy of the rules respecting parties, contained in this title, (*Title III, Parties to Civil Actions,*) to the

rules on the same subject in the late Court of Chancery, to resist the inference that it was the intention of the framers of the code to introduce the rules in equity practice respecting parties."

If this view is the correct one, and the term "real party in interest" has in courts of common law the same signification it had in equity, the case at bar is at an end. The plaintiff in error has no standing here. For it is an undoubted rule in New York that upon the foreclosure of a mortgage, the assignor, who has assigned the mortgage as collateral security, is a necessary party, and this, too, although the assignment is absolute in its terms, and expresses the receipt of a full consideration.

Johnson *v.* Hart, 3 Johns. Ch. 322.
Whitney *v.* McKinney, 7 Johns. Ch. 145.
Kettle *v.* Van Dyck, 1 Sandf. Ch. 76.
1 Daniell's Ch. Pr., Marginal pages, 304, 305, 307.

The rule in England is the same.

Palmer *v.* Carlisle, 1 S. & S. 423.
Wetherill *v.* Collins, 3 Madd. 255.
Hobart *v.* Abbott, 2 P. Wms. 642.
Norris *v.* Marshall, 5 Madd. 475.
Cooper's Equity Pleading 34.
Cathcart *v.* Lewis, 1 Vesey, Jr., 463.
Calvert on Parties 11.
Park *v.* Clinton, 12 Vesey 48.
Lowe *v.* Morgan, 1 Brown's C. C. 368.
Lewis *v.* Naugle, 2 Vesey 231.
Clerkson *v.* Bowyer, 2 Vern. 67.

That this is the proper construction of the section in question, has been clearly determined by the courts of New York.

In *Wallace* v. *Eaton*, 5 *Howard Pr.* 99, 102, an action was brought to set aside an alleged fraudulent sale and transfer of property by a debtor. The debtor was not made a party to the proceedings. The court say: If a complete determination of the controversy cannot be had without the presence of other parties, then the demurrer is well taken and the court should order them brought in. In this case the debtor, who, it is alleged, has made a fraudulent transfer

of his property, has a right to be heard, and must be made a party.

In *Hallenback* v. *Van Walkenburg*, 5 *Howard's Pr.* 281, 284, the court say, that the Chancery practice is now adopted in New York as to making parties. If a party having a common interest with the plaintiff refuses to join in the suit, he must be made a defendant.

In *Cook* v. *Genesee Insurance Company*, 8 *Howard's Pr.* 514, the court say: "In case of an assignment in parts to several persons, of an entire demand, an assignee of one of the parts might maintain a suit in equity to recover his part. But in such a suit, the assignees of the other parts, and the assignor, if he has retained any portion or interest, must be made parties to the suit."

In *Lewando* v. *Dunham*, 1 *Hilton* 114, the plaintiff, the assignee of the original claimant, had the absolute assignment of the claim under seal; it appeared in evidence that the assignor was entitled to share in the proceeds of the judgment. The court held that suit would not lie in the name of the assignee alone, but that the assignor was a necessary party, as a "real party in interest." This case holds the doctrine that the absolute legal title, although coupled with a beneficial interest, will not sustain an action under the circumstances.

In *Secor* v. *Keller*, 4 *Duer* 416, the question was raised whether a dormant partner was a necessary party to an action at law by his copartners. The court say: "Before the code, in an action at law, a dormant partner was not a necessary party, but in equity, every partner, active or dormant, having an interest in the controversy, was a necessary party, and we agree with the referee, that the code has adopted the rule which prevailed in equity and made it universal. The provision of § 111 is imperative, and subject to no other exception than those stated in § 113."

In *Considerant* v. *Brisbane*, 22 *N. Y. R.* 389, a suit was brought by Considerant upon a promissory note drawn by Brisbane, payable to Considerant, as executive agent of a firm, Bureau, Guillon, Godin & Co. Mr. Justice Wright, in delivering the opinion of the court, says, that although

prior to the code, Considerant could have maintained the action in his own name, because he had the absolute legal title. yet under § 111 he was not the real party in interest, the beneficial interest being the test of the right to sue. And in this case the plaintiff's right to sue was sustained, on the ground that he was within the exception of the § 113, being a trustee of an express trust.

In this case there was a dissenting opinion by Judge Denio, concurred in by Chief Justice Comstock and Judge Bacon, upon the point whether the principals named in the note were not the real promisees, and that the suit should have been in their name; but the court expressly and unanimously decide that the code introduced the equity practice, by which parties having the beneficial interest must be before the court, and that the beneficial and not the legal interest, was the sole test of a right to sue.

In *Western Bank* v. *Sherwood*, 29 *Barb.* 389, the court held that the assignor of a bond assigned as collateral security, was a necessary party to the suit on the bond.

In *Boynton* v. *Clinton Insurance Company*, 16 *Barb.* 254, was a suit by assignor and assignee, as plaintiffs, on a policy of insurance which had been assigned as collateral, and the court held that the assignor was rightly made a party, because he was a party in interest, as payment of the loss on the policy to that extent would extinguish his debt to the assignee.

In *Richtmeyer* v. *Richtmeyer*, 50 *Barb.* 55, 60, Mr. Justice Miller says: "Whenever different parties are interested in an account, although not in the same right, they should all be joined; as for instance heirs and personal representatives, residuary legatees and distributees, mortgagors, mortgagees, and their assignees, persons receiving and holding assets in succession in virtue of their representative character, and persons having distinct interests in the same security, either jointly or in succession." And to the same effect is *The Trustees of Auburn Theological Seminary* v. *Kellogg*, 16 *N. Y.* 83, 94, 97.

On the argument in the court below, great stress was laid upon the case of *St. John* v. *American Life Insurance Com-*

pany, 13 *N. Y.* 31. In that case the plaintiff sued upon two policies of insurance, which had been assigned to him under an agreement that if one of the policies should be paid to him, he would pay $1500 of the proceeds to the assignor's wife, and pay to her all that should be recovered on the other policy. The point was made that the assignor was a necessary party. But the Court of Appeals held otherwise, and rightly. For as he was the trustee of an express trust, undoubtedly the plaintiff had a right to his action in his own name. He was plainly within the exception of § 113.

And it will be found, upon an examination of all the New York cases in which a suit has been maintained by one not having the entire beneficial interest, that he has been held to be a trustee of an express trust, and so brought within the operation of the exception contained in § 113.

These decisions of the courts of New York, from the lowest to the highest, are all in accord with the construction which, it is insisted, should be given to the Code of procedure. It follows, therefore, that WALKER was a necessary party to an action upon the bond in that State. For it is evident that WOOD does not come within the exception of § 113. He is not, in any sense, a "trustee of an express trust." By the assignment of the bond to him as collateral, WOOD did not become a *trustee* for WALKER. The right of WALKER was not that of a *cestui que trust;* it was simply an equity—a right to redeem the bond by satisfying the debt for which it had been assigned as collateral.

If WOOD had, at some time, actually collected upon the bond an amount in excess of the debt due to him, for that excess a trust would have resulted; but until that contingency happened, WOOD was in no sense a trustee of an express trust.

WALKER, then, was a necessary party to the suit in New York, to render the judgment in that case a bar to the proceedings in New Jersey. Was he actually a party to that action? In determining this we are to look to the record for an answer.

The summons in this case is in the name of STEPHEN G.

WOOD, plaintiff, against ROBERT CHEW and PETER WALKER, defendants.

Transcript, p. 39.

The complaint is also *pro forma* entitled against both CHEW and WALKER.

Transcript, p. 39.

But in the complaint it is stated that WALKER was joined as a defendant, because his consent to be joined as a plaintiff could not be obtained, and judgment is demanded against Chew alone.

Transcript, p. 40.

There is no proof of the service of the summons on WALKER. There is no appearance by him to the action, and there is no answer by him to the complaint.

And the same may be said of Mrs. WALKER, administratrix of her husband.

Now in New York a summons may be served by the sheriff of the county, or by any other person, not a party to the action.

Code, (Edition 1853) 122, § 133.

Or, if the defendant cannot be found, then by publication of the summons in the newspapers.

Code, (Edition 1853) 126, § 135.

And the proof of the service of the summons is required to be made in one of four ways.

(1.) If served by the sheriff, by his certificate thereof.

(2.) If by any other person, by his affidavit thereof.

(3.) In case of publication, by the affidavit of the printer, or his foreman, or principal clerk showing the same, and an affidavit of a deposit of a copy of the summons in the post office, as required by law, if the same shall have been deposited; or,

(4.) By the written admission of the defendant.

And in case of service otherwise than by publication, the certificate, affidavit or admission must state the time and place of service.

Code, (Edition 1853) 133, § 138.

By the § 281 of the code, the clerk, immediately after entry of judgment, shall attach together and file the following papers, which shall constitute the judgment roll:

(1.) In case the complainant be not answered by a defendant, the summons and complaint, or copies thereof, *proof of service*, and that no answer has been received, the report, if any, and a copy of the judgment.

(2.) In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case and all orders and papers in any way involving the merits and necessarily affecting the judgment.

Code, (Edition 1853) p. 304, § 218.

It is evident from an inspection of the judgment roll in this cause, that there never was any service of the summons on WALKER—nor did he ever appear voluntarily—nor were any steps ever taken to make him a party by publication. In this action, admittedly there was no answer filed to the complaint of WOOD by WALKER, who had been joined as a defendant. The judgment roll should have contained, therefore, the summons, complaint and *proof of service* of summons. The judgment roll is wholly deficient in this particular—there is no proof of service of the summons on WALKER. It follows then, either, (1) that the judgment roll is not a correct or legal exemplification, and is therefore of no effect whatever as evidence, and has no connection with the case; or (2) that Walker was never a party to the action. The plaintiff in error can take either horn of the dilemma. A record made up according to the course of proceeding at common law commences by setting out the declaration, which avers that the defendant is in custody, or has been attached to answer, or was present in court in his own proper person, and in such a case the record would be *prima facie* conclusive against him. But this record does not aver any such facts, and besides, it must necessarily be made up according to the Code of procedure in New York, or it is no record.

There is, also, direct proof that WALKER was never a party to the proceedings in New York. In an affidavit

taken in this cause, Benjamin T. Kissam, who is attorney on record of Wood in the suit in New York, says: "The defendant, WALKER, never was served with a summons, because at about the time of commencing the action he moved out of the State of New York, and he never became a party to the action."

Transcript, p. 28, line 14, etc.

And again in the same affidavit he says: "After the death of PETER WALKER, it was stipulated between the attorney for the defendant, CHEW, and this deponent, that the said action should be continued in the name of CATHARINE WALKER, administratrix of the goods, &c., of PETER WALKER, deceased, and an order of the court was accordingly made and entered to that effect. But no copy of that said order was ever served on the said CATHARINE WALKER, and no proceedings were taken to bring her before the court, and she never was made a party to the action."

Transcript, pp. 28, 29.

The record and the evidence show, therefore, beyond dispute, that Walker was never made a party to the action in New York.

Now it is settled by the courts in New York, that a party not summoned, and not appearing, is not deemed as party to the suit and cannot be affected by the judgment, although he may be named as a party in the summons or complaint.

Code, (Edition 1853) 131, § 136.
Robinson *v.* Frost, 14 Barb. 536.
East River Bank *v.* Cutting, 1 Bosw. 536.
Norton *v.* Hayes, 4 Denio 246, 248.
Kellogg *v.* Olmsted, 6 Howard, Pr. 487.
Howard *v.* Finch, 5 Duer 666.

The conclusion, then, must be arrived at that the judgment obtained in New York, has not the virtue which is claimed for it, and is not a bar to the suit in New Jersey; and that the plaintiff in error is wholly without defence to that suit, except as to the amount paid on the bond to WOOD. And this is the conclusion and judgment of the Court of Chancery, and of the Court of Errors and Appeals of New Jersey.

A single remark as to the equity of this case. CHEW, the plaintiff in error in this court and the defendant below, after examination and search, purchases a farm for $7000, securing one half ot the purchase money by his personal bond and mortgage. When the assignee of that bond attempts to enforce the collection of it, CHEW claims to recoup damages (under the practice in New York,) for a misrepresentation of the quality and productiveness of the farm, alleged to have been made by WALKER, the vendor. That claim of recoupment concerns WALKER alone. WOOD, his assignee, does not, cannot know anything about its truth and fairness, or its utter falsity and fraud. WOOD simply desires to obtain by his action so much of the principal of the bond as will satisfy the debt due him. He does not care what may become of the balance. He is no defender of WALKER. Yet the cause in New York is tried, and damages against WALKER allowed to be recouped, in the absence of WALKER and without his knowledge. And now the plaintiff in error gravely insists that a judgment obtained in that way should estop Walker, or his absolute assignee, from recovering the balance due upon that bond. In referring to this, His Honor, Chancellor Zabriskie, says in his opinion in the Court of Chancery of New Jersey: "It would be strange if one holding a bond as collateral security for one half its amount, could bring suit upon it in the absence and without the knowledge of the pledgor, and by negligence or collusion, permit a defence to one half the amount to prevail, on recovering the amount necessary to pay his own claim."

Transcript, p. 70.

It is respectfully submitted, that the affirmance and adoption of the principle contended for by the counsel of the plaintiff in error, by this Honorable Court, would be inequitable and unjust, and would open wide the door for knavery and fraud.

EDW. T. GREEN,
Of Counsel with Defendant in Error.

Edw T Green
Of Counsel &c

Code Sec 111
sec 113
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